156-353

RECORD, CASE

SUPREME COURT OF THE

OCTOBER

TERM No.,

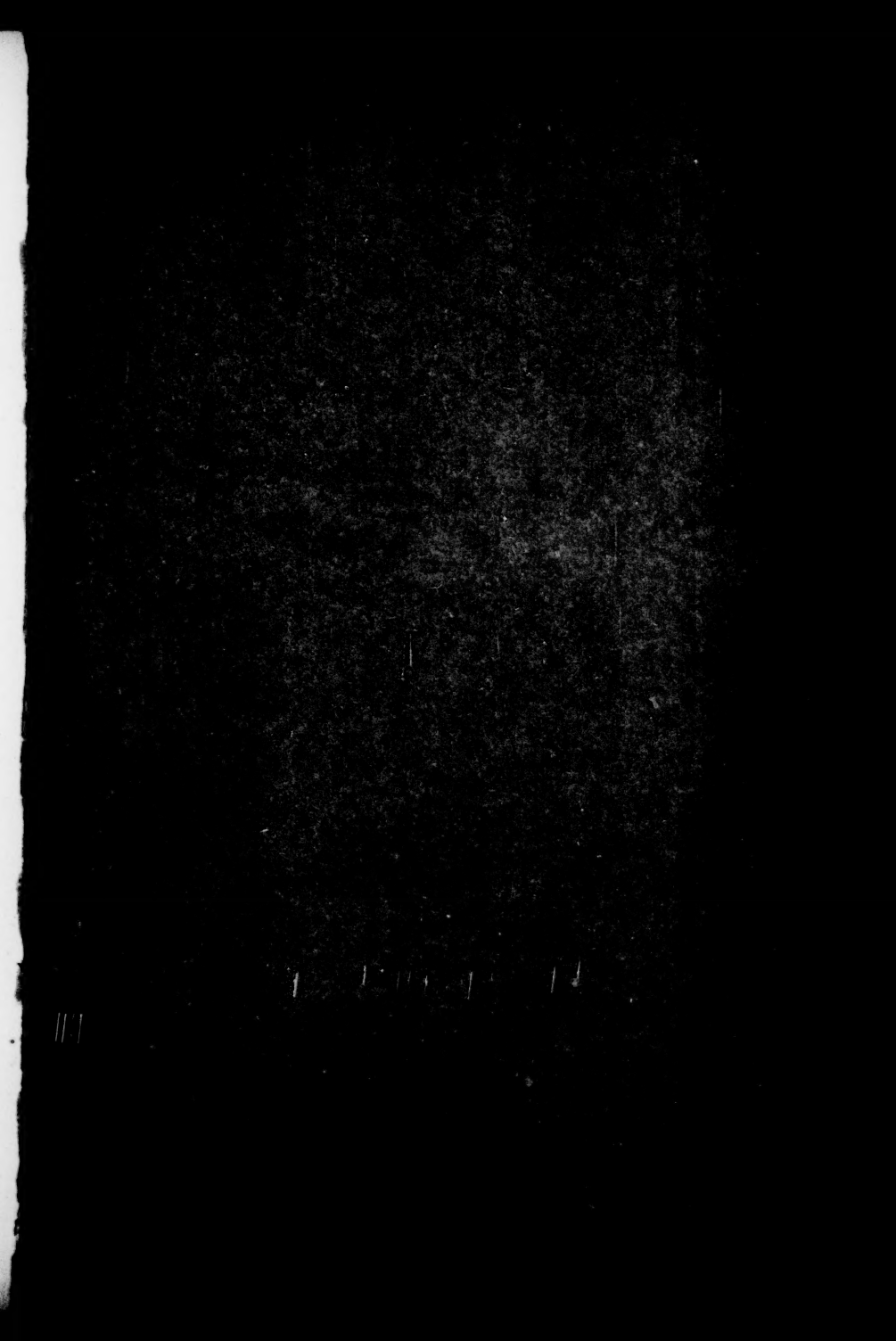
THE UNITED STATES EX REL. HENRY
TIFF IN ERROR,

vs.

OTTO THOMAN, COMPTROLLER OF THE CITY
ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE
THE EASTERN DISTRICT OF LOUISIANA.

FILED



RECORD, CASE No. 14,574.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No, 711.

THE UNITED STATES EX REL. HENRY SIEGEL, PLAINTIFF IN ERROR,

vs.

OTTO THOMAN, COMPTROLLER OF THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1892.

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a UNITED STATES OF AMERICA.

Circuit Court of the United States, Eastern District of Louisiana, at New Orleans.

UNITED STATES *ex Rel.* HENRY SIEGEL, Plaintiff in Error,
vs
OTTO THOMAN, Comptroller City of New Orleans, Defendant in Error.
} No. 11,900. Consolidated Case.

J. R. Beckwith and Henry L. Lazarus, Esquires, for plaintiff in error; Francis B. Lee, Esquire, ass't city attorney, for defendant in error.

Writ of error returnable to the Supreme Court of the United States of America, at the city of Washington, D. C., on the first day of April, A. D. 1891.

Transcript of Record.

1 Circuit Court of the United States, Eastern District of Louisiana.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS.
} No. 11,900.

Petition. Filed April 17, 1890.

To the honorable the judges of the circuit court of the United States for the fifth circuit, eastern district of Louisiana:

The petition of Henry Siegel, a citizen and subject of the Empire of Germany, respectfully represents—

That the city of New Orleans, a corporation duly created under the laws of Louisiana and a citizen of said State, is justly and truly indebted unto your petitioner in the sum of forty-nine hundred and sixty and $\frac{41}{100}$ dollars, with legal interest, as hereinafter set forth.

That your petitioner is the *bona fide* holder and owner for a valuable consideration of a number of certificates of indebtedness drawn by the city of New Orleans and made payable to bearer, a list of which is hereto annexed, as also one of said certificates.

That said certificates were issued for street wages and labor for the department of improvements performed during the year 1882, under ordinances No. 8124, administration series, making the
2 appropriation to pay said wages and labor.

That under the laws the revenues of each year is devoted in the expenditures of that year, and all sums appropriated shall be

paid in the order of the adoption of the ordinances wherein the appropriation is made.

That said certificates on their face recite the fact that they bear no interest.

That in due time the money to pay said ordinances and appropriations came into the city treasury, but that the same was not applied to the payment of petitioner's claims, and was used in paying posteria- ordinances.

That ordinance No. 8125 was paid in January, 1885, to the prejudice of petitioner's ordinances.

That, notwithstanding due demands, the city of New Orleans refuses to pay.

Wherefore petitioner prays that the city of New Orleans, through Jos. A. Shakespeare, mayor, be cited hereto and after due proceedings be condemned to pay petitioner the sum of forty-nine hundred and sixty & $\frac{41}{100}$ dollars ($4,960.41), with interest, at five (5) per cent. thereon, from the 2nd day of January, 1885, and petitioner prays for costs and for general relief.

(Signed) HENRY L. LAZARUS, *Attorney.*

Exhibit. Certificate of Indebtedness. Filed with Petition April 17, 1890.

2*a* No. 13711. ($150.)

Certificate of ownership of appropriation. Approved June 26th, 1883; issued under ordinance No. 347, C. S.

NEW ORLEANS, *July* 26, 1884.

This is to certify that under ordinance 8112, adopted Oct. 31, 1882, the sum of one hundred and fifty dollars has been appropriated to J. Flynn for and on account of dep't of imp'ts Oct., 1882, and the said named or the bearer hereof shall, upon the surrender of this certificate (and not otherwise), be entitled to receive in the order of the promulgation of said ordinance a cash warrant on the treasurer on any funds in the treasury to the credit of the appropriate fund and not otherwise appropriated.

It is herein specially agreed to by the holder of this certificate that it bears no interest and shall not novate or in any manner affect the nature of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof, and whenever the ordinance or that portion of it to which this certificate applies is paid or cancelled by being tendered and received in payment of taxes when authorized by law, then this certificate shall be surrendered to the office of the comptroller.

(Signed) J. N. HARDY, *Comptroller.*
(Signed) J. V. GUILLOTTE, *Mayor.*

Endorsed: Mayoralty of New Orleans, city hall, June 26th, 1883.

(No. 347. Council series.)

An ordinance to reduce to order and simplify the recording and management of unpaid accounts against the city for the years 1879, 1880, 1881, and 1882, by issuing for such as are ordinanced certificates of ownership of appropriation on the terms and conditions provided for in this ordinance.

SECTION 1. Be it ordained by the mayor and council, of the city of New Orleans, That any creditor of the city to whom an appropriation has been made, but in whose favor the comptroller cannot draw a warrant until there be money in the treasury to the credit of the appropriate account, not otherwise appropriated, shall be authorized upon demand to receive a transferable certificate of ownership of appropriation, entitling said creditor or bearer to receive a cash warrant for the amount due in the order of the promulgation of the ordinance authorizing the same.

SEC*ond* 2. Be it further ordained, That the said creditor shall sign a receipt therefor, stipulating that the cash warrant shall be claimed only on the surrender of this certificate, and the acceptance of said cash warrant shall be held and considered as an acceptance and consent to the provisions and conditions of this ordinance.

SECTION 3. Be it further ordained, That said cash warrants
2*b* shall be issued strictly in the order of the promulgation of the ordinance making the appropriation.

SECTION 4. Be — further ordained, That the certificates issued under this ordinance shall not novate or in any manner affect the nature of the claim against the city under this ordinance referred to, but shall be simply an evidence of transferable ownership thereof, and whenever the ordinance, or that portion of it to which said certificate applies and refers, is paid or cancelled by being tendered and received in payment of taxes, that is the city's portion for the respective years for which said certificate has been issued when authorized by law, then said certificate shall be surrendered to the office of the comptroller.

SECTION 5. Be it further ordained, That the certificate created by this ordinance shall state upon its face the nature and object of its issue, with numbers, dates and names suitable to each, and upon its reverse this ordinance in full shall be printed, the whole in words and figures, as follows, with the blanks appropriately filled in when issued from the office of the comptroller.

Adopted by the council of the city of New Orleans June 21st, 1883.

W. H. MICHEL,
Assistant Clerk of Council.

Approved June 26th, 1883.

W. J. BEHAN, *Mayor.*

A true copy.

C. L. WALKER,
Secretary to the Mayor.

3 NEW ORLEANS, *April 16th*, 1890.

This is to certify that the following claims appear on Register No. 4, being part of records in the comptroller's office:

No. of certificate.	No. ord.	Account & year.	Original holder.	Transferee.	Amount.
11756	8124	Dep't of imp. Sept., 1882.	Mrs. Sheridan	J. Strauss	52 00
13880	Promulgated	"	Jerry Duggan	J. Burckhardt	50 00
13881	Nov. 10, '72.	"	P. Royes	"	32 50
13882	"	"	Tim. McKay	"	50 00
13883	"	"	Jno. Kelly	"	3 75
13884	"	"	Jno. O'Neil	"	37 50
13885	"	"	J. Peyton	"	13 75
13886	"	"	Jno. Lusk	"	50 00
13887	"	"	Jas. Cock	"	32 50
13888	"	"	J. Shea	"	32 50
13897	"	"	Leon Durien	"	60 00
13910	"	"	Jno. McCabe	J. Strauss	40 00
13911	"	"	J. McLaughlin	"	50 00
13915	"	"	P. Sheridan	"	37 50
13916	"	"	Wm. Malloy	"	32 50
13917	"	"	J. Tennyson	"	32 50
13919	"	"	Wm. Monahan	"	32 50
13920	"	"	Sam. Hill	"	32 50
13921	"	"	J. Murphy	"	32 50
13922	"	"	J. Haddigan	"	16 25
13923	"	"	M. Duffy	"	16 25
13924	"	"	P. Ryder	"	32 50
	Amount	carried forward			$769 50
4					
	Amount	brought forward			$769 50
13925	8124	Dep't of imp., Sept., 1882.	J. Bombach	J. Strauss	32 50
13926	"	"	Mrs. Boylan	"	52 00
13929	"	"	J. Featherson	"	32 50
13930	"	"	J. McCormack	"	17 50
13931	"	"	C. Putnam	"	32 50
13933	"	"	J. McManus	"	19 37
13938	"	"	F. Eckert	"	32 50
13939	"	"	Pat. Hopkins	"	32 50
13942	"	"	H. Hall	"	32 50
13943	"	"	P. Ducastaing	"	26 67
13945	"	"	J. Brennan	"	30 00
13946	"	"	H. Shroeder	"	31 25
13954	"	"	Jas. Campbell	"	32 50
13962	"	"	J. Duryee	"	32 50
13993	"	"	Mrs. Lyons	"	52 00
14153	"	"	L. Weisenbach	C. B. Soares	20 00
14154	"	"	Mrs. Maher	"	55 00
14235	"	"	J. C. Donovan	H. & B. Beer	60 00
14236	"	"	Jno. Collins	"	50 00
14237	"	"	Chas. Hewitt	"	40 00
14238	"	"	Gus. Mankuet	"	60 00
14239	"	"	Joe McGuire	"	40 00
14240	"	"	J. Berkery	"	50 00
14241	"	"	Ed. Hutchins	"	50 00

No. of certificate.	No. ord.	Account & year.	Original holder.	Transferee.	Amount.
14242	8324	Dep't of imp., Sept., 1882.	J. Locklin	H. & B. Beer	32 50
14243	"	"	J. Shay	"	32 50
	Amount	carried forward			$1,748 29
5					
	Amount	brought forward			$1,748 29
14244	8124	Dept. of imp., Sept., 1882.	J. O'Rourke	H. & B. Beer	32 50
14245	"	"	Rob't Lilly	"	32 50
14246	"	"	B. Patterson	"	32 50
14247	"	"	J. Mitchell	"	32 50
14248	"	"	M. Johnson	"	15 00
14249	"	"	Mrs. King	"	56 00
14250	"	"	Jno. McGrath	"	31 25
14251	"	"	Chas. Smith	"	31 87
14252	"	"	M. Kenny	"	31 87
14253	"	"	Jas. Kelly	"	31 87
14254	"	"	B. Flynn	"	32 50
14255	"	"	Pat. King	"	50 00
14256	"	"	O. McGuinness	"	32 50
14257	"	"	S. Moulton	"	32 50
14258	"	"	D. Murphy	"	32 50
14260	"	"	A. Leonard	"	32 50
14261	"	"	M. Kelly	"	32 50
14262	"	"	Jas. Collins	"	15 00
14263	"	"	Dan. Curry	"	17 50
14264	"	"	A. Downs	"	20 00
14265	"	"	F. Glynn	"	32 50
14266	"	"	Jas. Sullivan	"	32 50
14267	"	"	P. Lally	"	32 50
14268	"	"	P. Melia	"	32 50
14269	"	"	J. Harper	"	32 50
14270	"	"	Peter Heil	"	52 00
	Amount	carried forward			$2,588 15
6					
	Amount	brought forward			$2,588 15
14271	8124	Dept. of imp., Sept., 1882.	J. Falstick	H. & B. Beer	32 50
14272	"	"	F. McGuire	"	16 25
14273	"	"	E. Nolan	"	32 50
14274	"	"	Mrs. McCord	"	44 00
14275	"	"	Mrs. Ross	"	44 00
14276	"	"	Mrs. Cassidy	"	56 00
14277	"	"	Mrs. Leonard	"	54 00
14278	"	"	Mrs. Guyon	"	40 00
14279	"	"	Mrs. Kenner	"	52 00
14280	"	"	Mrs. Leonard	"	48 00
14281	"	"	D. Murphy	"	40 00
14282	"	"	Wm. Kramer	"	52 00
14283	"	"	L. Griffin	"	32 50
14284	"	"	Mrs. Golden	"	38 00
14285	"	"	H. Byrd	"	32 50
14286	"	"	J. Carrick	"	32 50
14287	"	"	D. Anselme	"	7 50
14288	"	"	A. Tourne	"	5 00
14289	"	"	L. Bringer	"	8 75
14290	"	"	V. Perotteau	"	8 75

No. of certificate.	No. ord.	Account & year.	Original holder.	Transferee.	Amount.
14291	8124	Dept. of imp., Sept., 1832.	Mrs. Russell	H. & B. Beer	60 00
14292	"	"	W. Shepard	"	52 00
14293	"	"	P. Collins	"	50 00
14294	"	"	D. Bradberry	"	25 00
14295	"	"	J. Hanchen	"	25 00
14296	"	"	C. Fox	"	32 50
	Amount	carried forward			$3,509 40
7					
	Amount	brought forward			$3,509 40
14297	8124	Dept. of imp., Sept., 1882.	M. Snell	H. & B. Beer	32 50
14298	"	"	M. Murray	"	32 50
14299	"	"	J. Robert	"	32 50
14300	"	"	M. Gardner	"	32 50
14301	"	"	Mrs. Hart	"	56 00
14303	"	"	M. Campbell	"	32 50
14304	"	"	F. O'Rourke	"	32 50
14305	"	"	H'y Dare	"	32 50
14306	"	"	W. Regan	"	32 50
14307	"	"	Jno. Bremberry	"	32 50
14308	"	"	P. Dignan	"	32 50
14309	"	"	Jno. Bowers	"	32 50
14310	"	"	W. Roonay	"	32 50
14311	"	"	Jno. Lawler	"	52 00
14312	"	"	J. Shoemaker	"	52 00
14313	"	"	Mrs. Root	"	31 00
14314	"	"	D. Lobrano	"	33 00
14315	"	"	F. Stoch	"	7 50
14316	"	"	Geo. Apfel	"	52 00
14317	"	"	A. Eberhart	"	22 50
14318	"	"	Mike Egan	"	52 00
14319	"	"	D. McGee	"	52 00
14320	"	"	J. McCormack	"	50 00
14321	"	"	Jno. Kelly	"	32 50
14322	"	"	Jas. Kelly	"	32 50
14323	"	"	Mrs. McGraw	"	52 00
	Amount	carried forward			$4,476 40
8					
	Amount	brought forward			$4,476 40
14324	8124	Dept. of imp., Sept., 1882.	T. Sullivan	H. & B. Beer	32 50
14325	"	"	M. Lane	"	22 00
14326	"	"	Jno. Conners	"	10 00
14327	"	"	Ed. Scully	"	50 00
14328	"	"	D. Hutchings	"	32 50
14229	"	"	P. Contoulon	"	120 00
14330	"	"	Jas. Burke	"	50 00
14331	"	"	P. Mulholland	"	5 00
14440	"	"	Mrs. Hays		57 00
14449	"	"	Mrs. Klein	Jacob Alexander	55 00
14452	"	"	Jos. Bath	F. P. Stuart	50 00
	Total				$4,960 40

JNO. L. NEWMAN,
For Comptroller.

9 *Citation. Issued April* 17, 1890.

UNITED STATES OF AMERICA,
Eastern District of Louisiana.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900.

The President of the United States of America to The City of New Orleans, through Joseph A. Shakespeare, mayor, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 17 day of April, A. D. one thousand eight hundred and ninety, and Independence of the United States of America the 114th year.

Teste:

[L. S.] (Signed) E. R. HUNT, *Clerk.*

10 *Marshal's Return.*

Received by U. S. marshal, New Orleans, La., Ap'l 17, '90, and on the same day and date I served a true copy of the within citation and accompanying petition on the city of New Orleans, through its mayor, Hon. Jos. A. Shakespeare, by handing the same to him in person and leaving the same in his hands at his office, city hall, in New Orleans.

Ret'd April 18, '90.

(Signed) J. B. DONNALLY,
U. S. Marshal,
Per T. M. MOORMAN,
D'y U. S. Marshal.

Answer. Filed April 28, 1890.

U. S. Circuit Court, Eastern District of La.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900.

And now for answer comes the defendant herein and denies all and singular the allegations contained in plaintiff's petition and prays to be hence dismissed with all costs and for general relief.

(Signed) FRANCIS B. LEE,
Ass't City Att'y.

11 *Hearing and Submission.*

Extract from the Minute Book, April Term, 1890.

NEW ORLEANS, TUESDAY, *May* 20, 1890.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900.

This cause was this day called for trial.
Present: Henry L. Lazarus, attorney for plaintiff; Francis B. Lee, ass't city attorney for defendant.
Whereupon the parties in the cause, by stipulation, waived trial by jury and the cause was heard upon the pleadings, evidence, and arguments of counsel and submitted.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, April Term, 1890.

12 NEW ORLEANS, WEDNESDAY, *May* 21, 1890.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900.

This cause having been heard, argued, and submitted to the court, the parties in the cause having by stipulation waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-nine hundred and sixty and $\frac{40}{100}$ dollars ($4,960.40) and costs, but without interest; said judgment to be paid exclusively out of such revenues of the city of New Orleans of the year 1882 as may be collected by the said city from revenues set apart by the amended budget of the said city for the said year 1882, made under ordinances 8004, 8005, 8096, 8097, administration series, and legally and properly payable and for which appropriation was made in said amended budget, provided that any surplus of the revenues of any subsequent year may be applied to the payment of the debts of the year 1882, according to section 3 of act No. 30 of 1877.

Judgment rendered May 21, 1890.

Judgment signed May 26, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

13 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, WEDNESDAY, *May* 21, 1890.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

HENRY SIEGEL
vs. } 11901.
CITY OF NEW ORLEANS.

This cause having been heard, argued, and submitted to the court, the parties in the cause having by stipulation waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of thirty-one hundred and twenty-two & $\frac{99}{100}$ dollars ($3,122.99) and costs, but without interest; said judgment to be paid exclusively out of such revenues of the city of New Orleans of the year 1882 as may be collected by the said city from revenues set apart by the amended budget of the said city for the said year 1882, made under ordinances 8004, 8005, 8096, 8097, administration series, and legally and properly payable and for which appropriation was made in said amended budget, provided that any surplus of the revenues of any subsequent year may be applied to payment of the debts of the year 1882, according to section 3 of the act No. 30 of 1877.

Judgment rendered May 21, 1890.

Judgment signed May 26, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

14 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, WEDNESDAY, *May* 21, 1890.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11902.

This cause having been heard, argued, and submitted to the court, the parties in the cause having by stipulation waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Seigel, do have and recover of and from the defendant, The City of New Orleans, the sum of thirty-five hundred and one & $\frac{77}{100}$ dollars ($3,501.77) and costs, but without interest; said judgment to be paid exclusively out of such revenues of the city of New Orleans of the year 1882 as may be collected by the said city from revenues set apart by the amended budget of the said city for the said year 1882, made under ordinances 8004, 8005, 8096, 8097, administration series, and legally and properly payable and for which appropriation was made in said amended budget, provided that any surplus of the revenues of any subsequent year may be applied to the payment of the debts of the year 1882, according to section 3 of the act No. 30 of 1877.

Judgment rendered May 21, 1890.
Judgment signed May 26, 1890.
(Signed) EDWARD C. BILLINGS, *Judge.*

15 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11914.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and

being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-eight hundred and thirty-two & $\frac{80}{100}$ dollars ($4,832.80), without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

16 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11915.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of four thousand and eighty-three & $\frac{25}{100}$ dollars, without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1881, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

17 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11916.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-two hundred and seventy-one $\frac{7}{100}$ dollars ($4,271.07), without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

18 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11917.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-seven hundred and thirty-nine and $\frac{60}{100}$ dollars ($4,739.60), without interest, but with costs; sixteen hundred dollars of the said sum to be payable out of the revenues of the said city for the year 1880, fourteen hundred and fifty-seven and $\frac{20}{100}$ dollars ($1,457.20) thereof to be payable out of the revenues of said city for the year 1881, and sixteen hundred and eighty-two and $\frac{40}{100}$ dollars ($1,682.40) thereof payable out of the revenues of the said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

19 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11918.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of thirty-two hundred and ninety-six & $\frac{90}{100}$ dollars ($3,296.90), without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1879, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

20 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11919.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of thirty-nine hundred & seventy-nine & $\frac{45}{100}$ dollars ($3,979.45), without interest, but with costs; the said sum

payable out of the revenues of the said city for the year 1879, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge*

21 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11920.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of thirty-nine hundred & sixty-three & $\frac{30}{100}$ dollars ($3,963.30), without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1879, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

22 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11921.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-seven hundred and fifty-three & $\frac{45}{100}$ dollars ($4,753.45), without interest, but with costs; seventeen hundred and ninety-one & $\frac{87}{100}$ dollars ($1,791.87) of said sum payable out of the revenues of said city for the year 1880 and twenty-nine hundred and sixty-one & $\frac{58}{100}$ dollars ($2,961.58) thereof payable out of the revenues of said city for the year 1881, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

23 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11923.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-eight hundred and fifty-four & $\frac{74}{100}$ dollars ($4,854.74), without interest, but with costs; fifteen hundred and forty-five & $\frac{6}{100}$ dollars ($1,545.06) of said sum payable out of the revenues of said city for the year 1881 and thirty-three hundred and nine & $\frac{68}{100}$ dollars ($3,309.68) thereof payable out of the revenues of said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

24 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11924.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-nine hundred and seventeen & $\frac{18}{100}$ dollars ($4,917.18), without interest, but with costs; three hundred and fifty-four and $\frac{33}{100}$ dollars ($354.33) of said sum payable out of the revenues of said city for the year 1881 and forty-five hundred and sixty-two & $\frac{85}{100}$ dollars ($4,562.85) thereof payable out of the revenues of said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

25 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11925.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-six hundred and seventy-four

& $\frac{25}{100}$ dollars ($4,674.25), without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1879, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

26 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11926.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-seven hundred and fifty-six & $\frac{36}{100}$ dollars ($4,756.36), without interest, but with costs; twenty-eight hundred and sixty-nine & $\frac{60}{100}$ dollars ($2,869.60) of said sum payable out of the revenues of the said city for the year 1879 and eighteen hundred and eighty-six and $\frac{76}{100}$ dollars ($1,886.76) thereof payable out of the revenues of the said city for the year 1881, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

27 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11927.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived

trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-six hundred and fifty-five & $\frac{33}{100}$ dollars ($4,655.33), without interest, but with costs; the said sum payable out of the revenues of the said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

28 *Judgment.*

Extract from the Judgment Book, April Term, 1890.

NEW ORLEANS, THURSDAY, *June* 19, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11928.

This cause having been heard, argued, and submitted to the court, the parties in interest having by stipulation on file waived trial by jury, and the court having considered the evidence and being fully advised in the premises, finds the issues of fact raised by the pleadings to be in favor of the plaintiff:

It is therefore ordered, adjudged, and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, The City of New Orleans, the sum of forty-eight hundred and ninety-nine and $\frac{33}{100}$ dollars ($4,899.33), without interest, but with costs; twenty-two hundred and seventy-four and $\frac{86}{100}$ dollars ($2,224.86) of the said sum payable out of the said city for the year 1879, thirty-three and $\frac{50}{100}$ dollars ($33.50) thereof payable out of the revenues of the said city for the year 1881, and twenty-five hundred and ninety and $\frac{97}{100}$ dollars ($2,590.97) thereof payable out of the revenues of the said city for the year 1882, with full benefit of the provisions of section 3 of act No. 30 of 1877.

Judgment rendered June 19, 1890.

Judgment signed June 24, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

29 UNITED STATES OF AMERICA,
Eastern District of Louisiana, } *ss:*

CLERK'S OFFICE.

I, Edward R. Hunt, clerk, do hereby certify that the petitions upon which the foregoing judgments were rendered are substantially

the same as that of No. 11900, except as to the amounts of the demands which are hereinafter set forth.

I further certify that the city scrip sued on was issued in the years written opposite the number of each suit, as set forth in the following statement, viz:

	Amount of demand.	Issuance of script.
No. 11901,	$3,122.99	1882.
No. 11902,	3,501.77	1882.
No. 11914,	4,832.80	1882.
No. 11915,	4,083.25	1881.
No. 11916,	4,271.07	1882.
No. 11917,	4,739.60	1880, 1881, 1882.
No. 11918,	3,296 90	1879.
No. 11919,	3,979.45	1879.
No. 11920,	3,963.30	1879.
No. 11921,	4,753.45	1880, 1881.
No. 11923,	4,854.74	1881, 1882.
No. 11924,	4,917.18	1881, 1882.
No. 11925,	4,674.25	1879.
No. 11926,	4,756.36	1879, 1881.
No. 11927,	4,655.33	1882.
No. 11928,	4,899.33	1879, 1881, 1882.

Witness my hand and seal of said court, at the city of New Orleans, this — day of ——, 1891.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

30 *Opinion of Court on Original Suits. Filed June* 18, 1890.

United States Circuit Court, Eastern District of Louisiana.

H. SIEGEL *vs.* THE CITY OF NEW ORLEANS. } Nos. 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, 11928.

These suits are brought against the city of New Orleans on certificates of indebtedness of the city made payable to bearer and are issued under ordinance 347, council series, and are for claims against the city under certain ordinances of the years 1879, 1880, 1881, 1882.

The city's answer is a general denial. By stipulation trial by jury is waived and the causes are submitted to the court.

On the evidence submitted, which is made up of the certificates of indebtedness aforesaid as per list filed, the city makes no opposition to the right of the parties plaintiff to judgments for the amounts sued for, but insists that the said judgments shall be restricted to and only made payable out of the revenues of the respective years in which the debts were contracted, and that the judgments, shall be without interest.

1st. We are of the opinion that the judgments should be limited in accordance with the provisions of section 3 of act No. 30 of 1877, which section may be in terms incorporated in the judgments.

31 2nd. The original creditor had a conceded claim against the city of New Orleans, which was due, but was by law limited to payment out of the revenues of the year in which the debt was created.

This claim undoubtedly carried interest, but was transferable only by the assignment. In order to obtain an obligation of the city for the amount of the claim, which should be transferable by delivery, the creditor accepted the terms and provisions of ordinance No. 347, council series, and received from the city the certificates referred to in said ordinance.

In said ordinance it is provided "that the creditor shall be authorized on demand to receive a transferable certificate of ownership of appropriation entitling said creditor or bearer to receive a cash warrant for the amount due in the order of the promulgation of the ordinance authorizing the same," and "that the certificates issued shall not novate or in any manner affect the nature of the claim against the city under this ordinance referred to, but shall be simply an evidence of transferable ownership thereof."

In the ordinance no mention is made of interest, but in the certificate it is specially agreed by the holders that they shall bear no interest.

As by the terms of the ordinance there was to be no novation of the debt, the holder of the certificate owns the original debt or claim, and is, so far as they are not waived in the certificate, subrogated to all the rights of the original creditor.

Although not required by the ordinance, the creditor, in obtaining his transferable certificate, waived the right to collect interest.

32 He had a right to thus modify his claim, and when he did so and received a certificate for such modified demand, which he sold to plaintiff, the latter took only what he bought, to wit, a debt not bearing nor to bear interest.

The plaintiffs are not entitled to judgments bearing interest, even from judicial demand.

June 18th, 1890.

(Signed) DON A. PARDEE,
Circuit Judge.
EDWARD C. BILLINGS,
District Judge.

33 Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES *ex Rel.* H. SIEGEL
vs.
O. THOMAN, Comptroller. } No. 11900.

Petition for Mandamus. Filed June 28, 1890.

To the honorable the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of the United States *ex rel.* Henry Seigel, a citizen and subject of the Empire of Germany, with respect represents—

That your petitioner has recovered final judgment in this hon. court for the sum of forty-nine hundred and sixty $\frac{40}{100}$ dollars against the city of New Orleans, a corporation created under the laws of the State of Louisiana and a citizen of said State; that said judgment was rendered in the case of Henry Seigel *vs.* City of New Orleans, No. 11900 of the docket of this court, and is final and executory, and was duly registered in the comptroller's office of said city; that by the terms of said judgment your petitioner is entitled to have the same satisfied and paid out of the surplus revenues of any year subsequent to that in which said indebtedness was created,

34 and that there is now in the city treasury a surplus of revenues for the years 1888 & 1889 largely in excess of the amount of your petitioner's judgment, and out of which surplus your petitioner is entitled by law and the judgment of this hon. court to be paid.

That notwithstanding due demand the comptroller of said city refuses to warrant on the treasurer for this amount, and the only remedy the relator has is by writ of mandamus.

Wherefore your relator prays a writ of mandamus do issue, directed to Hon. Otto Thoman, comptroller, ordering him to set apart the surplus revenues of the years 1888 & 1889 over and above the actual expenditures for said years, as provided in the budget for said years, for the expenses of the municipal government of said city, and to warrant on the city treasurer in favor of your relator and against the cash now on hand for said years 1888 & 1889 in the full amount of the judgments rendered in favor of your relator against the city of New Orleans, and all costs, or show cause to the contrary on such day as this hon. court may fix why said writ of mandamus should not be made peremptory; and relator prays for all general relief.

(Signed) J. R. BECKWITH &
HENRY L. LAZARUS,
Attorneys.

Henry L. Lazarus, being duly sworn, deposes and says that he is the attorney of Henry Seigel, and that the facts contained in the foregoing petition are true.

(Signed) HENRY L. LAZARUS.

Sworn to and subscribed before me this 28th day of June, 1890.
[L. S.] (Signed) HUNTER C. LEAKE, *Not. Pub.*

35 Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES *ex Rel.* HENRY SIEGEL
vs.
THE CITY OF NEW ORLEANS. } No. 11900.

Order on Petition for Mandamus.

Let an alternative writ of mandamus issue herein as prayed for and according to law, returnable before the circuit court of the United States on Monday, November 3, 1890, at 11 o'clock a. m.
(Signed) DON A. PARDEE,
Circuit Judge.

June 28, 1890.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., June 30th, '90, and on the same day I served a true copy of the within petition and order for mandamus on Otto Thoman, comptroller, by handing the same to him in person, at his office, in the city hall, and leaving the same in his hands.
(Signed) J. B. DONNALLY,
U. S. Marshal,
By J. B. DONNALLY, JR.,
D'y U. S. Marshal.

Returned July 2, '90.

36 *Rule to Dismiss or Consolidate Mandamus Proceedings. Filed Nov'r 8, 1890.*

United States Circuit Court, Eastern District of Louisiana.

HENRY SIEGEL
versus
THE CITY OF NEW ORLEANS. } Numbers 11900, 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, 11928.

On motion of Francis B. Lee, assistant city attorney, herein appearing as the attorney of Otto Thoman, Esq., comptroller of the city of New Orleans, made defendant in the mandamus proceedings sought to be instituted in each of the cases above entitled and numbered, and on suggesting to the court—

That in each of the cases numbered and entitled as above judgment has been rendered and signed in favor of plaintiff therein and against the city of New Orleans for the respective amounts specified in each, without interest, but with costs of suit, confining the payment of the said judgments to the revenues of the particular year

during which the indebtedness out of which the claims covered by the said judgments was contracted, and reserving to plaintiff the full benefit of the provisions of section 3 of act No. 30 of the year 1877.

That on or about the 28th of June last past, shortly after
37 the said judgments had become final and executory, plaintiff in the said suits, in the same proceedings entitled and numbered as above and in which the said judgments were rendered, filed petitions against the said Otto Thoman, comptroller as aforesaid, for a writ of mandamus in each case ordering him to set apart the surplus revenues of the city of New Orleans of the years 1888 and 1889 and to warrant on the city treasurer in his (relator's) favor against the cash now in his hands representing the surplus of the said years or show cause to the contrary on a day fixed, viz., the third day of November, 1890.

That the said proceedings by mandamus, being directed against the comptroller of the city for the purpose of enforcing the performance by him of an alleged ministerial duty, he not having been a party to the suits in which the said judgments sought to be collected by means of the process of mandamus were rendered, and not being against the said city in its corporate capacity, and the said proceedings latterly taken as aforesaid in the same entitled and numbered suits as those in which the judgments were rendered being entirely distinct and separate from those that resulted in the judgments and being directed against entirely different persons, could not have been so taken legally in the same suits numbered and entitled the same on the docket of this court, and they should be dismissed and set aside as having been irregularly brought, reserving, however, to relator the right to reinstitute them as separate proceedings under a separate number of the docket.

That in the event, and only in that case, that the court shall not order the separation of the said mandamus proceedings from those that resulted in the judgments referred to, then defendant
38 suggests that the said proceedings by way of mandamus are causes of a like nature, having the same objects and purposes and involving the same questions of law and fact, and should be consolidated, tried together, and one judgment rendered in all.

It is ordered that the plaintiff in the said suits entitled and numbered as above and relator in the mandamus proceedings sought to be engrafted upon them do show cause on Saturday, the 8 day of November, 1890, at 11 o'clock a. m., why the said mandamus proceedings issued under the title and numbers stated above should not be dismissed and set aside, reserving, however, to plaintiff and relator the right of renewing his applications under the proper style and number of the docket of this court, and why, in default of such order of discontinuance being granted by the court, the said mandamus proceedings should not be consolidated, tried as one case, and a single judgment rendered for all the present cases.

It is further ordered that the said Thoman be relieved from filing a return to the several writs of mandamus issued herein until

the final settlement of the questions involved in this rule and a decision thereon.

Service accepted.

New Orleans, 30th October, 1890.

(Signed) HENRY L. LAZARUS,
Attorneys of Plaintiff and Relator.

Order: Rule to Dismiss or Consolidate Continued.

Extract from the Minute Book, November Term, 1890.

39 NEW ORLEANS, SATURDAY, *November* 8, 1890.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

U. S. *ex Rel.* HENRY SIEGEL *vs.* OTTO THOMAN, Comptroller. } Nos. 11900 to 11902, 11914 to 11921, 11923 to 11928.

In these causes it was ordered that the defendant file a return to the petition for mandamus in one of said causes, which, at his option, may stand as a return in all of them, and thereupon said causes and the rule to dismiss or consolidate same without prejudice were continued to Monday, December 1, 1890, at 11 a. m.

Return of Otto Thoman, Comptroller, to Alternative Writ of Mandamus Issued Herein and Exhibit "A." Filed Nov'r 18, 1890.

United States Circuit Court, Eastern District of Louisiana.

HENRY SIEGEL *vs.* THE CITY OF NEW ORLEANS. } No. 11900.

Now into this honorable court comes Otto Thoman, comp-
40 troller of the city of New Orleans, made respondent in the mandamus proceedings filed herein, and with full reservation of the benefit of the rule taken herein to dismiss these mandamus proceedings as having been improperly instituted under this title and this number of the docket of this court or to consolidate them with the others described in the said rule and only in case the points therein made should be decided by the court adversely to respondent, the said rule being hereby made part of this return for greater certainty, does, for return to the alternative writ of mandamus issued herein against him, say:

That he excepts to the said petition for a writ of mandamus filed herein on the ground that the same discloses no cause of action for the relief therein asked in this:

1st. That it does not set forth a clear legal right in plaintiff which is sought to be enforced by means of the writ.

2d. That it does not allege a violation on the part of respondent

of a clear legal and ministerial duty towards plaintiff, in which event alone the writ will lie.

And now, with reservation of the benefit of the said exception, and only in case that the same be overruled, respondent answers as follows:

It is admitted that in these proceedings numbered and entitled as above a judgment was rendered in favor of plaintiff and against the city of New Orleans for the sum set forth in the petition for mandamus, with costs, but without interest; the said sum to be payable exclusively out of the revenues of the said city for the particular year during which the indebtedness sued on was
41 contracted, and which judgment reserved to plaintiff the benefit of the provisions of section 3 of act No. 30 of the year 1877, passed by the General Assembly of the State of Louisiana, all of which will more fully appear from the said judgment, which is annexed hereto and made part hereof.

It is also admitted that the said judgment is final, but it is denied that the same is executory in the broad sense of that term when applied to judgments, payment of the same being limited upon its face to the revenues of the said city for the year during which the indebtedness represented by it was contracted, so that it is executory only in the partial and restricted way mentioned.

That the act No. 30 of 1877 referred to in the said judgment and which is hereto annexed and made part hereof is entitled "An act to limit the appropriation and expenditures of parishes and municipal corporations, to prohibit the issue of warrants by their officers, to permit police juries to make certain contracts, and prescribing certain penalties," approved March 28, 1877, and the section 3 specially referred to in the said judgment is as follows: "That the revenues of the several parishes and municipal corporations of this State of each year shall be devoted to the expenditures of that year, provided that any surplus of said revenues may be applied to the payment of the indebtedness of former years;" that it is in consequence of the existence of this act that the judgment herein is limited to the revenues of particular years and is not a general and absolute one against the said city.

That, according to the requirements of act No. 38, passed
42 by the General Assembly of this State at its session in the year 1879; of act No. 20 of the session of 1882 (known as the city charter of New Orleans), and of the various acts amendatory of section 66 of the last-mentioned act, viz., act No. 88 of 1884 and act No. 109 of 1886, all of which said acts are hereto annexed and made part hereof, the councils of the said city, sitting respectively in the years 1888 and 1889, made for those years budgets of expenditures and of revenues, by the former of which in each year they appropriated the entire estimated revenues, twenty per cent. thereof for permanent public improvements and eighty per cent. thereof for the alimony of the municipality or the regular expenses of carrying on the business of government; that the revenues of the said city for the said years are by the said acts dedicated to the objects set forth in the said budget of expenditures, and none of the reve-

nue of the said years can be diverted or used for any purpose other than the payment of the obligations described in the budget until all the debts of the said years representing claims on the budget have been paid; that there can, therefore, be no surplus of either of the years mentioned until all the claims budgeted for as payable out of the revenues of that year are paid.

That it is not true, as set forth in the said petition for mandamus, that there is now or ever has been in the treasury of the city of New Orleans any surplus of the revenues of the years 1888 or 1889, but, on the contrary, the fact is that the collections of taxes and other revenues for the said years have not been sufficient to meet the claims for the respective years found upon the budgets. Suf-
43 ficient of the revenues of those years have been received to pay claims budgeted against the alimony and which are payable out of the eighty per cent., but as yet not enough money has been received to pay all claims budgeted for as payable out of the reserve fund of twenty per cent. Hence, if for no other reason, the writ will not lie as prayed for, for no public officer can be mandamused to pay out money before the funds have gotten into his possession.

Further answering, respondent alleges that, even if there were now or had been at the date of the service of the papers herein upon respondent a surplus of the revenues of the two years in question in the treasury, respondent could not be compelled by mandamus to warrant against the same, for the reason that under the charter of the city (act No. 20 of 1882) respondent is prohibited from warranting upon the treasurer, except when ordered so to do by ordinance of the council, and no ordinance has been passed making any disposition in advance of the possible surplus for the years mentioned. In fact, the said council could not do so legally, for the reason that act No. 135 of the year 1888, which is hereto annexed and made part hereof, in section 5 thereof, prohibits the council of the said city from contracting or appropriating against the surplus of any year until the cash to meet the claim is in the treasury. Hence, if a surplus for the years in question were in the treasury and the writ would lie at all, the proper persons against whom it should be leveled are the members of the city council, to compel them to pass the necessary ordinance instructing me to warrant on the treasurer.

But were there a surplus for each of the years mentioned
44 in the treasury, and were this an endeavor on the part of relator to secure the writ against the members of the council as just suggested, it would not lie, for the reason that under the authority of section 3 of the said act of 1877, the benefit of which, whatever it might be decided to be, was reserved to plaintiff in the judgment that forms the basis of these proceedings, it is within the exclusive discretion of the members of the city council to devote the surplus of any year to the debts of previous years or to expend it in some other manner which, in their judgments, may be more conducive to the municipal welfare, and this discretion is not controllable by mandamus.

That whatever may have been considered the legitimate and proper interpretation to place upon the proviso of section 3 of act No. 30 of 1877, prior to the passage of act No. 135 of 1888, and when examined by the light of the then existing legislation upon the subject-matter of the said act No. 30 of 1877, the General Assembly by section 5 of the said act of 1888 has declared in unmistakable and unequivocal terms that thereafter at least the council of the city shall have the right, in its discretion, to contract and appropriate against any money in the treasury that is a surplus of any year for any municipal purpose whatever; that section 5 of said act of 1888 is a legislative interpretation of what has always been the true meaning of the proviso of section 3 of the act of 1877, which is binding upon the public and the courts.

But even if it should be determined that the view that I have presented of the effect of the section of the act of 1888 just
45 mentioned is incorrect, and should the court so interpret the word "may" in the proviso aforesaid as to give it the effect of shall and declare that the proviso had the effect of dedicating to the payment of the indebtedness of previous years the surplus of subsequent years, still there is nothing in the proviso that can be held to have had the effect of withdrawing from the council the discretion of deciding to what indebtedness of previous years any particular surplus of a subsequent year shall be devoted, and hence the discretion in the particular mentioned remaining in the council cannot be controlled by mandamus, and the writ should be refused.

But, again, should this point be held not to be well taken, and should it be considered that all discretion in the distribution of a surplus of any year was withdrawn from the council by the said proviso, it must then be interpreted as an equitable dedication of all surpluses of subsequent years to the payment of all outstanding indebtedness of previous years, in which event relator would not be entitled to payment in full of his claim out of the surplus of the two years in question unless there were no outstanding indebtedness of the city for years prior to 1888 and 1889 or unless there were surplus enough for the two years to pay all debts of previous years in full, but he would be entitled simply to his *pro rata* share of the surplus on hand at the date of the issuance of his writ, and this *pro rata* share cannot be ascertained and claimed in mandamus proceedings, but relator must be relegated to the proper proceedings in equity, to be carried on contradictorily with those persons
46 holding the other claims of previous years entitled to share said surplus with him.

That there is, as explained above, no surplus of the years 1888 and 1889 now in the treasury of the city, and that the outstanding indebtedness of the said corporation for the years 1879 to 1886, inclusive, amounts to the sum of three hundred and eighty-three thousand four hundred and forty-four $\frac{46}{100}$ dollars ($383,444.46), including the judgments of the said relator obtained in proceedings in this court, numbered respectively upon the docket thereof, 11900, 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920,

11921, 11923, 11924, 11925, 11926, 11927, and 11928, and now sought to be collected by way of mandamus proceedings similar to those in the instant case, amounting to the sum of seventy-four thousand two hundred and sixty-two $\frac{17}{100}$ dollars ($74,262.17), of which amount of indebtedness $21,510.22 have been reduced to judgments payable out of the revenues of the year during which the indebtedness accrued and $18,021.69 have been merged into judgments payable out of the revenues of the particular year during which the debts were contracted, and which, like those of relator, reserved to plaintiffs therein the benefit of the proviso under discussion, all of which will appear from the statement hereto annexed and made part hereof as Exhibit "A."

Wherefore respondent prays that the demand of relator be rejected at his costs.

(Signed) FRANCIS B. LEE,
Assistant City Attorney for Defendant.

47 Otto Thoman, being sworn, deposes and says that he is the comptroller of the city of New Orleans; that he is the defendant in the proceedings by mandamus taken herein, and that the facts set forth in the foregoing answer and return are true.

(Signed) O. THOMAN.

Sworn to and subscribed before me this 18th day of November, 1890.

[L. S.] (Signed) CAS. H. SHIELDS,
Notary Public.

EXHIBIT A.

Judgments on Claims Due for Years 1879 *to* 1886, *Inclusive, and Payable Out of Revenues of said Years.*

Unpaid ordinances of 1879	$52,739 24		
1880	15,236 43		
1881	32,498 89		
1882	171,365 12		
1884	34,064 42		
1886	90,925 06		
			$396,832 16
Cash on hand to pay unpaid ordinance 1879	$1,822 44		
1880	4,052 84		
1881	828 95		
1882	1,371 29		
1884	1,386 30		
1886	3,925 88		
			13,387 70
			$383,444 46

48 1. Payable out of revenues of particular year:

Chas. B. Block	$1,002 16	
A. G. James	3,268 30	
Geo. E. Essig	1,000 00	
" "	620 00	
Jacob Burkhardt	937 11	
F. L. Fernandez	4,543 86	
W. O. Johnson	6,653 87	
Adam Ravanac	1,000 00	
C. H. Stewart	2,484 92	
		$21,510 22

2. Payable out of revenues of particular year, with following clause added: "Provided that any surplus of the revenues of any subsequent year may be applied to the payment thereof according to sec. 30 of act of 1887:

Geo. W. Dougherty	$2,017 86	
" "	3,987 83	
Milner Coal and Railroad Co.	12,016 00	
		18,021 69
		39,531 91
Henry Siegel judgments		$74,262 17

49 *Motion to Dismiss Denied and Causes Consolidated.*

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, MONDAY, *December* 15, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

HENRY SIEGEL *vs.* CITY OF NEW ORLEANS. } Nos. 11900, 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, 11928.

These causes came on this day to be heard on the motion of the defendant to dismiss the mandamus proceedings taken under the above numbers, or in default of such dismissal to consolidate the said mandamus proceedings and try same as one case—present, J. R. Beckwith and H. L. Lazarus, for plaintiff; Francis B. Lee, assistant city attorney, for defendant—and was argued; whereupon and — consideration thereof it was ordered that the motion to dismiss be denied, but that the mandamus proceedings and the several causes be consolidated into one cause, to be entitled Henry Siegel *vs.* City of New Orleans under the number 11900, consolidated.

Exception of Relator to Return of Respondent. Filed Dec. 15, 1890.

50	THE UNITED STATES on Relation of HENRY SIEGEL *vs.* OTTO THOMAN, Comptroller City of New Orleans.	Nos. 11900, 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, 11928.

Alternative mandamus to enforce the payment in the cases of Henry Siegel *vs.* City of New Orleans.

Now comes Henry Seigel, relator, by Henry L. Lazarus and J. R. Beckwith, his attorneys, and, suggesting to the court that the return to the alternative writs of mandamus directed to said respondent, Otto Thomann, are not in compliance with the command of said alternative writs, in that, amongst other things, said writs commanded and required said Otto Thomann, respondent, to make true and explicit return concerning the total revenue and income of the said city of New Orleans for and during the years 1888 and 1889 and the total amount of money actually expended and disbursed by the city of New Orleans for and during the said years by actual appropriation and disbursement and the balance of said revenues for said years on hand and unexpended for the expenses and disbursements of and for each and both of said years, in order that the court might, as matter of fact and law, determine whether there was any surplus for each, either, or both of said years applicable in law for the payment of said final judgments.

And also suggesting to the court that said respondent has disobeyed said duty and command, and in that particular has made only the following evasive return, to wit:

51 "That it is not true, as set forth in said petition for a writ of mandamus, that there is now or ever has been in the treasury of the city of New Orleans any surplus of revenues for the years 1888 or 1889; but, on the contrary, the fact is that the collection of taxes and other revenues for said years have not been sufficient to meet the claims for the respective years found upon the budgets. Sufficient of the revenues of those years have been received to pay the claims budgeted against the alimony and which are payable out of the eighty per cent., but as yet not enough money has been received to pay all claims budgeted for as payable out of the reserve fund of twenty per cent."

Which said return in that respect and particular is not due and proper obedience to the command of the court, but cunning and evasive.

Wherefore said relator, excepting to said return as insufficient and evasive, moves the court now here that said return be deemed and held evasive, insufficent, and in non-compliance with the order of the court and the duty of said respondent in the premises, and that said Otto Thoman, respondent, be ordered in a short time to be fixed by the court to make full, true, complete return to said alter-

native writs, showing with exactness the total income and revenue of the city of New Orleans from all sources for each of said years of 1888 and 1889, and exactly how much of said revenue or income has been paid out of the treasury of the city of New Orleans on due and proper comptroller's warrants for the actual expenses incurred and disbursements made for and during each and both of said years
52 1888 and 1889, and for what balance in exact figures there has been no warrant based upon particular appropriations in due form made by the counsel for the expenses of said years 1888 and 1889 in order that the court may be advised of the real truth in the premises.

New Orleans, December 15th, 1890.

Order: Exception Maintained so far as to Require Respondent to File an Amended Return.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, MONDAY, *December* 15, 1891.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

U. S. *ex Rel.* HENRY SIEGEL *vs.* OTTO THOMAN, Comptroller.	Nos. 11900, 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, 11928.

These causes came on this day to be heard on the exception filed by the relator to the return of respondent to the alternative writs of mandamus—present, J. R. Beckwith and H. L. Lazarus for relator; F. B. Lee, ass't city attorney, for the respondent—and were argued; whereupon and on consideration thereof it was or-
53 dered that the exception be maintained in so far as to require the respondent to file as amended return, showing the collections and disbursements of the city during the years 1888 and 1889 respectively, being the years in which a surplus is claimed, such return to be filed on to-morrow.

It is further ordered that these causes be continued to Thursday, December 18, 1890, at 11 a. m. for further hearing.

Supplemental and Amended Return. Filed Dec. 18, 1890.

United States Circuit Court, Eastern District of Louisiana.

HENRY SIEGEL *versus* THE CITY OF NEW ORLEANS.	Numbers 11900, 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, 11928. Consolidated.

Now, into this honorable court, by undersigned counsel, comes Otto Thoman, comptroller of the city of New Orleans, made defend-

ant in the mandamus proceedings instituted herein, and in compliance with the order of court rendered upon the exception filed by relator to the return of respondent herein files the following amended and supplemental return and says—

54 That, as is shown by statements hereto annexed and made part hereof as Exhibits "A" and "B" and "E," the budget of expenditures of the city of New Orleans for the year 1888 covered the sum of $1,474,093.10 for the alimony of the city and the sum of $88,752.04 for the reserve fund of that year, making the total budgeted for all purposes against the revenues of that year the sum of $1,562,845.14; that the total collections out — the revenues of the said year to date is the sum of $1,550,502.32; that out of the said amount the sum of $1,474,093.10 has been paid on account of the alimony of the city and $47,343.05 has gone to pay claims payable out of the reserve fund, and $29,066.17 is now in cash in the treasury of the city to the credit of the reserve fund for that year and is retained instead of being paid out to the persons holding claims payable out of the same in order to protect himself in the event of an adverse decision herein. If the said $29,066.17 were paid out to the said creditors, as it should be and will be as soon as the demand of relator herein is refused, there would still remain unpaid claims against the said reserve fund of the said year amounting to the said sum of $12,342.82. Until the said amount is collected and paid there will not have been a complete settlement of all claims budgeted for out of the said reserve fund, and no surplus will have accumulated.

That, as is shown by statements hereto annexed and made part hereof as Exhibits "C" and "D" and "F," the total amount of the budget of expenditures of the city of New Orleans for the year 1889 was the sum of $1,565,053.04, out of which the sum of $1,415,053.04 was set aside for the alimony of the city for the said year, and the sum of $150,000 for the settlement of claims payable out of

55 the reserve fund; that $1,415,053.04 has been paid to creditors of the city, payable out of the amount set apart for its alimony; $71,709.90 has been paid to creditors, payable out of the reserve fund, and there is now in cash in the treasury of the city the sum of $47,901.21 which should be paid to those creditors of the city, payable out of the reserve fund for that year, which would have been paid long ago but for these suits, which made it necessary for respondent to retain the amount in order to protect himself against a possible judgment herein adversely to himself, and which will be paid to them as soon as these proceedings have terminated.

After payment of the said $47,901.21 to the persons entitled to it there will still remain a deficit of $30,388.89 to pay in full all the claims budgeted as payable out of the reserve fund for the said year 1889, and until such amount of $30,388.89 is collected and paid to the creditors of the city to whom it belongs there cannot and will not be any surplus of revenues of the said year.

Again reiterating the statements of the original return in regard to the subject-matter of above supplemental and amended return—

Respondent prays that the demand of relator be denied and his suit dismissed at his costs.

(Signed) FRANCIS B. LEE,
Assistant City Attorney.

Otto Thoman, being sworn, deposes and says that he is the comptroller of the city of New Orleans; that he is the respondent
56 in the above entitled and numbered mandamus proceedings, and that the facts set forth in and the allegations of the foregoing supplemental and amended return to the said writs are true.

(Signed) O. THOMAN,
Comptroller.

Sworn to and subscribed before me this 17 day of December, 1890.

[L. S.] (Signed) CAS. H. SHIELDS,
Notary Public.

Hearing and Submission.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, THURSDAY, *December* 18, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900. Consolidated.

This cause came on this day for further hearing upon the application for writs of mandamus against Otto Thoman, comptroller.

57 Present: J. R. Beckwith and H. L. Lazarus, for relator; Francis B. Lee, ass't city attorney, for respondent.

Whereupon the parties filed a stipulation waiving trial by jury, and the cause was taken up before the court. After hearing the evidence and the arguments of the counsel for the parties respectively the cause was submitted and taken under advisement.

Decree Refusing Mandamus. Entered and Filed December 25, 1890.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

U. S. *ex Rel.* HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900. Consolidated Case.

This cause came on at a former day to be heard upon the application of the relator for writs of mandamus to Otto Thoman, comp-

troller of the city of New Orleans, the parties in interest having filed a stipulation waiving trial by jury and having been heard upon the pleadings, evidence, and arguments of counsel was submitted.

Whereupon and on consideration thereof, for the reasons assigned in the written opinion on file, it is now ordered, adjudged, and decreed, both judges concurring, that the application of the
58 relator be denied, and that the writs of mandamus applied for be refused, with costs.

(Signed) DON A. PARDEE,
Circuit Judge.
EDWARD C. BILLINGS,
District Judge.

December 25, 1890.

Rule for New Trial.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, SATURDAY, *December* 27, 1890.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

THE UNITED STATES *ex Rel.* HENRY SIEGEL
vs.
CITY OF NEW ORLEANS. } No. 11900. Consolidated.

On motion of J. R. Beckwith and H. L. Lazarus, attorneys for relator, it is ordered that the defendant show cause on Friday, January 9, 1891, at 11 a. m., why a new trial should not be
59 granted in this cause for the following reasons, amongst others:

That the court erred in its construction of the statutes of the State relating to the issue involved, and that the judgment is contrary to law, and that the respondent be notified thereof.

Order: New Trial Refused and Amount of Bond Fixed.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, SATURDAY, *February* 28, 1891.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

HENRY SEIGEL
vs.
CITY OF NEW ORLEANS. } No. 11900.

This cause came on this day to be heard on the rule filed herein by plaintiff for a new trial and was submitted; whereupon it was ordered that the motion for a new trial be refused and the judgment remain undisturbed.

It is further ordered that the amount of bond for writ of error herein to the Supreme Court of the United States be fixed at five hundred dollars.

60 *Decree Refusing Mandamus.*

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, November Term, 1890.

U. S. *ex Rel.* HENRY SEIGEL
vs.
CITY OF NEW ORLEANS. } No. 11900. Consolidated Case.

This cause came on at a former day to be heard upon the application of the relator for writs of mandamus to Otto Thoman, comptroller of the city of New Orleans, the parties in interest having filed a stipulation waiving trial by jury, and having been heard upon the pleadings, evidence, and arguments of counsel was submitted.

Whereupon and on consideration thereof, for the reasons assigned in the written opinion on file, it is now ordered, adjudged, and decreed, both judges concurring, that the application of the relator be denied, and that the writs of mandamus applied for be refused with costs.

Judgment rendered December 25, 1890.

Judgment signed March 5, 1891, as of date March 3, 1891.

(Signed) DON A. PARDEE,
Circuit Judge.
EDWARD C. BILLINGS,
District Judge.

61 *Assignment of Error. Filed March* 3, 1891.

United States Circuit Court, Eastern District of Louisiana.

THE UNITED STATES *ex Rel.* HENRY SEIGEL
vs.
OTTO THOMAN, Comptroller of the City of New Orleans. } No. 11900. Consolidated Case.

And now comes Henry Seigel, relator and plaintiff in error in this cause, by J. R. Beckwith and H. L. Lazarus, his counsel, and assigns as errors of the circuit court in the judgment and decree herein:

First. That upon the relation, petition, return, and record herein the court erred in not granting and allowing the peremptory writ of mandamus herein as prayed for in the petition.

Second. That under the laws of the State of Louisiana and the facts as found by the circuit court there should have been allowed a peremptory writ of mandamus as prayed for, and the court erred

in refusing to allow such writ and in dismissing the relator's demand with costs.

Third. The court erred in adjudging and considering the money found to be in the treasury of the city of New Orleans and under the control of Otto Thoman, comptroller of said city, was not
62 — excess of revenues over expenditures for the years named in the relator's petition, to be applied to the payment of the judgments described in relator's petition, and in not causing the same to be applied in discharge and payment of the relator's said judgments.

Fourth. That the court erred in its construction of the act of the legislature of Louisiana of 1877, and in finding as a matter of law that the term "former years," referred to in said act of 1877, is to be limited and confined to "years former to 1877."

Fifth. That the court erred in not holding that all moneys unexpended during any of said years remaining in the treasury after the payment of all appropriations absolutely made during the year or relating to the year in which the revenue — received or collected *was* not the excess of receipts over expenditures referred to in the said act of 1877.

Sixth. The court erred in rendering any decree against the relator or plaintiff but on the record — the facts as found and upon the statutes and public laws of the State of Louisiana, and should have rendered judgment in favor of the plaintiff and relator herein.

(Signed) J. R. BECKWITH &
HENRY L. LAZARUS,
Counsel for Relator and Pl'ff in Error.

63 Know all men by these presents that we, Henry Siegel, as principal, — Henry L. Lazarus, as surety, are held and firmly bound unto Otto Thoman, comptroller of the city of New Orleans, in the full and just sum of five hundred dollars, to be paid to the said Otto Thoman, comptroller of the city of New Orleans, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, New Orleans division, in a suit depending in said circuit court wherein The United States on the relation of the said Henry Seigel is plaintiff and Otto Thoman, comptroller of the city of New Orleans, defendant, judgment was rendered against the said Henry Siegel, relator, said cause being No. 11900 of the docket of said court, and the said Henry Siegel having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Otto Thoman, comptroller of the city of New Orleans, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the first day of April next:

Now, the condition of the above obligation is such that if the said Henry Siegel shall prosecute his writ to effect and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

(Signed) HENRY SIEGEL, [L. S.]
By J. R. BECKWITH, *His Att'y.* [L. S.]
HENRY L. LAZARUS. [L. S.]

64 [Endorsed:] No. 11900. United States circuit court, eastern district of Louisiana. —— —— *vs.* —— ——. Bond for writ of error. Filed March 5, 1891. —— ——, clerk.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, } *ss:*

Personally appeared Henry L. Lazarus, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, La., and is worth the full sum of five hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) HENRY L. LAZARUS.

Subscribed and sworn before me this 5 day of March, 1891.

(Signed) H. J. CARTER,
Deputy Clerk U. S. Circuit Court, Eastern District of Louisiana.

65 *Opinion of Court on Application for Writ of Mandamus. Filed Dec'r 25, 1890.*

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex Rel.* HENRY SIEGEL
vs.
THE CITY OF NEW ORLEANS. } Consolidated Case.

The following the court finds as the facts in this case:

The judgments of the relator against the respondent amount in the aggregate to $74,262.17 and are founded on indebtedness arising in the years 1879, 1880, 1881, and 1882.

The evidence establishes that for the year 1888, as well as the year 1889, the common council of the city of New Orleans appropriated out of the twenty per cent. reserved for public improvements by the act No. 20, p. 35, section 66, of the Acts of 1882 and 1886, No. 109, p. 205, section 1, for the payment of debts not in the budget of those years and not contracted in those years, an amount greater than the aggregate of relator's judgments, and that of the said twenty per cent. reserved by the statute for public improvements there is now for those years more in the treasury of the respondent than would be sufficient to pay the entire amount of relator's judgments.

66 The statutes necessary to be considered are the first three sections of act No. 30, page 47, of the Acts of 1877; section 5 of act No. 38 of the Acts of 1879, page 58, and act No. 109, page 105, of Acts of 1886.

No. 30, Act of 1877.

"SECTION 1. That no police jury of any parish, nor any municipal corporation in this State, shall make any appropriation of money for any year which appropriation separately, or together with any other appropriation or appropriations of the same year, shall be in excess of the actual revenue of said parish or municipal corporation for that year.

"SEC. 2. That no police jury of any parish nor municipal corporation in this State shall approve any claim or make any expenditure which shall separately, or together with other claims approved or expenditures made, be in excess of the actual revenues of that year.

"SEC. 3. That the revenues of the several parishes and municipal corporations of this State, of each year, shall be devoted to the expenditures of that year; provided, that any surplus of said revenues may be applied to the payment of the indebtedness of former years."

No. 38, Act of 1879.

"SECTION 1. That it shall be the duty of the board of administrators or common council of the city of New Orleans, on or about the second Tuesday of December, 1879, and upon the second Tuesday of December of each and every year thereafter, or thereabouts, to propose a detailed statement exhibiting the amount of revenues for the ensuing year expected to be derived by the said city from taxes and licenses, and with such estimate of receipts as aforesaid it shall be the duty of the aforesaid board of administrators
67 or common council to propose a detailed statement or estimate, exhibiting the several items of liability and expenditure on the part of said city for the year aforesaid, including the requisite amount for contingent expenses during that time; such estimate of liabilities and expenditures shall not, however, in the aggregate amount thereof, exceed four-fifths of the estimated amounts of revenues or receipts therein above provided for."

"That section 66 of act No. 20, approved June 23d, 1882, entitled 'An act to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions,' be amended and re-enacted so as to read as follows: The council shall not under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent. of said revenues, which reserve and all sums, rights, interests and credits received from miscellaneous or contingent sources, shall be appropriated by the council for the purpose of permanent public improvement, as herein provided for."

The claim of the relator is that when properly defined there is shown to be a surplus for the years 1888 and 1889, and that under the act of 1877, since the debts of the city to him were contracted while that act was in force, he has a right to that surplus.

As to the existence of a surplus for the years 1888 and 1889, that which is claimed to be a surplus is an unexpended but ap-
68 propriated amount of the twenty per cent., the legislature having dedicated this twenty per cent. to the purpose of permanent public improvements. This dedication is conclusive upon the relator's claim, unless the act of 1877 has given him a right to a surplus which the act of 1886 could not qualify.

This brings us to the question whether the act of 1877 gave any future creditor any fixed right to any surplus. That act was passed under these circumstances:

The legislature had been endeavoring by every legislative mandate to prevent the city of New Orleans from increasing its floating debt.

Up to the date of that statute their efforts had been in vain. Then it was enacted that no appropriation should be made and no claim approved by any municipal corporation during any year in excess of the actual revenues of that year; that the revenues of each year should be devoted to the expenditures of that year, and, since a large floating debt for former years already existed, a provision was added that any surplus of revenues might be applied to the payment of the indebtedness of former years. In our opinion the "former years" means years former to 1877, for any outstanding indebtedness for any year after 1877 had been rendered impossible if the statute which contains this provision as to power to appropriate was obeyed.

There could, of course, be no surplus unless there remained some amount not appropriated.

Section 3, Act of 1877, was not meant to guaranty that there would be any such amount, nor to limit the discretion of the ap-
propriating power to provide for all necessary expenditures
69 either on the part of the legislature or on the part of the common council.

It simply provided that if after the discretion of the appropriating power had been exercised there remained a surplus it might be used in paying indebtedness of former years. The amended charter of 1886 expressly directed twenty per cent. of the proceeds of the taxes even before they were levied to the highly meritorious purpose of permanent improvements. This dedication, in our opinion, was in violation of no right of the relator and it is not a surplus, but a legally appropriated sum, which the relator asks should be applied to the payment of his judgments.

Our opinion, therefore, is that there is no surplus shown, but that the amount remaining unexpended is destined by the legislature to the purpose of permanent public improvements and cannot be diverted from that purpose either by the city or its creditors, and that there was no intention on the part of the legislature to guarantee or

pledge to any of its creditors any surplus; certainly not to the creditors whose debts arose after 1877.

(Signed) DON A. PARDEE,
Circuit Judge.
EDWARD C. BILLINGS,
District Judge.

70 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 69 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of U. S. *ex rel.* Henry Siegel *vs.* The City of New Orleans, consolidated, No. 11900 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 13 day of March, A. D. 1891.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 13 day of March, A. D. 1891.

EDWARD C. BILLINGS, *Judge.*

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, New Orleans division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States of America on the relation of Henry Seigel against Otto Thoman, comptroller of the city of New Orleans, No. 11900 of the docket of your said court, consolidated with numbers 11901, 11902, 11914, 11915, 11916, 11917, 11918, 11919, 11920, 11921, 11923, 11924, 11925, 11926, 11927, & 11928 of the same docket, all causes between the same plaintiff and

the same defendant consolidated as one cause by the order of the court, a manifest error hath happened, to the great damage of the said Henry Siegel, relator in said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first day of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 3d day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

72 [Endorsed:] United States circuit court No. 11900. The United States *ex rel.* Henry Siegel *versus* Otto Thoman, comptroller city of New Orleans. Writ of error. Allowed as of the date of March 3d, 1891, that having been the date of the application for the writ of error. Edward C. Billings, judge. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed March 3, 1891. E. R. Hunt, clerk.

73 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Otto Thoman, comptroller of the city of New Orleans, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first day of April next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division, wherein The United States of America on the relation of Henry Siegel is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Henry Siegel, relator and plaintiff in error in said writ, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 3d day of March, in the year of our Lord one thousand eight hundred and ninety-one.

This citation is signed as of the date of March 3, 1891, that being the date of the application for the writ of error.

EDWARD C. BILLINGS, *Judge.*

74 [Endorsed:] United States circuit court, eastern district of Louisiana. No. —. —— —— *vs.* —— ——. Citation. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed March 7, 1891. E. R. Hunt, clerk.

Marshal's Return.

STATE OF LOUISIANA, }
Parish of Orleans, Eastern District of Louisiana, } *ss:*

Richard Peete, Jr., being duly sworn, deposes and says—

That on the fifth day of March, 1891, at the city of New Orleans, in the said district, he served upon Otto Thomann, comptroller of the city of New Orleans, the citation in error in this case, which was and is the duplicate original of the citation to which this affidavit is attached; that he served the same by delivering the same into the hands of the said Otto Thomann personally, at his office, in the city hall, in the city of New Orleans, leaving the same with him.

RICHARD PEETE, JR.

Sworn to and subscribed before me this sixth day of March, 1891.

{Seal Hunter C. Leake, Notary Public, State of Louisiana, Parish of Orleans.}

HUNTER C. LEAKE, *Not. Pub.*

Endorsed on cover: Case No. 14,574. E. Louisiana C. C. U. S. No. 711. The United States *ex rel.* Henry Siegel, plaintiff in error, *vs.* Otto Thoman, comptroller of the city of New Orleans. Filed April 11, 1891.

SUPREME COURT OF THE UNITED ST

October Term, 1894.

THIS No. 125

THE UNITED STATES EX REL. HENRY SIEG
PLAINTIFF IN ERROR,

versus

OTTO THOMAN, COMPTROLLER OF THE CITY OF
ORLEANS.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF ON BEHALF OF HENRY SIEGEL, PLAINTIFF IN ERROR.

J. R. BECKWITH,
HENRY L. LAZARUS,
Attorneys for Plaintiff in Error.

JANUARY 1st, 1895.

TYPOGRAPHIC, PRINT. 20 NATIONAL ST., N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892.

TERM No. 711.

THE UNITED STATES EX REL. HENRY SIEGEL,
PLAINTIFF IN ERROR,

versus

OTTO THOMAN, COMPTROLLER OF THE CITY OF NEW ORLEANS.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF ON BEHALF OF HENRY SIEGEL, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Henry Siegel, a citizen and subject of the Empire of Germany, instituted in 1890 numerous suits against the City of New Orleans in the United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana. The basis of his demand was certificates issued by the City of New Orleans, evidencing the City's indebtedness to its employes for services rendered for various years prior to

1882, and which certificates of indebtedness, being payable to bearer, were purchased by Henry Siegel. On the City's refusal to pay, suits were instituted thereon and judgments entered in favor of Siegel against the City of New Orleans, for the various amounts claimed in his respective petitions. (R. pp. 1, 2, 3, 8, 19).

There were two classes of judgments rendered. In suit No. 11,900, judgment was entered for $4,960.40, and costs, but without interest, "said judgments to be *paid exclusively* out of such revenues of the City of New Orleans of the year 1882, as may be collected by the said City from revenues set apart by the amended budget of the said City for the year 1882, * * * and legally and properly payable, and for which appropriation was made in said amended budget, *provided that any surplus of the revenues of any subsequent year may be applied to the payment of the debts of the year 1882, according to Section 3 of Act 30 of 1877.*" (R. 9).

In suit No. 11,901, a judgment was entered in the same language, for the sum of $3,122.99. (R. 9). In suit No. 11,902, the same language was used in entering up a judgment against the City, the amount being $3,501.77. (R. 10).

In suits Nos. 11,914, 11,915, 11,916, 11,917, 11,918, 11,919, 11,920, 11,921, 11,923, 11,924, 11,925, 11,926, 11,927 and 11,928, absolute judgments were rendered against the City for the respective amounts claimed in the suits, with the full benefit of the provisions of Sec. 3 of Act 30 of 1877. The language of the judgments in those cases is, "that the plaintiff, Henry Siegel, do have and recover from the defendant, the City

of New Orleans, the sum of $4,083.25, without interest but with costs; the said sum payable out of the revenues of said City for the year 1881, *with full benefit of the provisions of Section 3 of Act No. 30 of 1877.*" (R. 11, 12, 13, 14, 15, 16, 17, 18).

And here it is proper to attract the attention of the Court to the essential difference between the judgments. In those first referred to, the limitation of the judgment confines the plaintiff exclusively to the revenues of the year in which the debt was created, with the right to look to the surplus of any subsequent year to insure their payment. The second class of judgments, to which we have referred, is absolute against the City, but recognizes the right of plaintiff to look to the revenues of those years in which the debt was created, and to the surplus of any subsequent years. In other words, the last judgments, to which we now direct the attention of the Court, are absolute against the City for the amount claimed, but recognize in the plaintiff the right, independent of the City's property generally, to look for the payment of those judgments to the revenues of the particular year, and also the surplus revenues of all subsequent years. Therefore, the judgments in favor of plaintiff give him the right, first, to enforce his claim generally against the City of New Orleans; secondly, they give him a prior right upon the revenues of the year in which the debt was created; and, thirdly, they give him a right to the surplus arising from the revenues unexpended, for any year subsequent to the creation of his debts, and prior to the rendition of the judgments.

The judgments rendered in the various cases of Siegel vs. the City of New Orleans, were registered with the

Comptroller, and due demand was made for their payment. The City having refused to discharge its obligations, mandamus proceedings were instituted by the plaintiff, upon the relation of the United States against Otto Thoman, Comptroller, and in the petition it is recited, "that by the terms of the judgment, your petitioner is entitled to have the same satisfied and paid out of the surplus revenues of any year subsequent to that in which said indebtedness was created; that there is now in the city treasury a surplus of revenues for the years 1888 and 1889, largely in excess of the amount of your petitioner's judgments, and out of which surplus your petitioner is entitled, by law and the judgment of this Honorable Court, to be paid; that, notwithstanding due demand, the Comptroller of said City refuses to warrant on the treasury for this amount, and the only remedy relator has is by writ of mandamus." The prayer for relief is: "Wherefore, your relator prays a writ of mandamus do issue, directed to Hon. Otto Thoman, Comptroller, ordering him to set apart the surplus revenues of the years 1888 and 1889, over and above the actual expenditures for said years, as provided in the budget for said years, for the expenses of the municipal government of said City, and to warrant on the City Treasurer in favor of your relator, and against the cash now on hand for said years 1888 and 1889, in the full amount of the judgments rendered in favor of your relator against the City of New Orleans, and all costs, or show cause to the contrary," etc. (R. 21).

Petitions for mandamus were filed in each of the cases in which Siegel had recovered judgment. Upon motion of the City Attorney, and under Sec. 921 of the Revised Statutes,

U. S., the causes were ordered consolidated. (R. 24). An elaborate and argumentative return to the writs was made by the City Attorney (R. 24), to which it is unnecessary, in the discussion of the case under consideration, to do more than generally refer. Exceptions were taken to the return as made, which being sustained, an additional return, or one supplemental to the original, was made. (R. 30, 31). We say it is not necessary to do more than refer to these returns generally, because the findings of fact eliminate from discussion or consideration the collateral matter recited in the returns, and bring the Court to the immediate consideration of the two-fold issue: *first*, whether funds received during a particular year and unexpended in the year, constitute a surplus for that year; and, *secondly*, whether, when once a surplus exists, and that surplus legally dedicated to the payment of antecedent debts, it is competent for the debtor to divert it so as to impair, if not destroy, the security which the creditor had and to which he looked at the time the debt was created. Both of these propositions we shall elaborate upon and discuss in that part of the brief devoted to argument.

FINDINGS OF FACT.

"The following the Court finds as the facts in the case:

"The judgments of the relator against the respondent amount in the aggregate to $74,262.17, and are founded on indebtedness arising in the years 1879, 1880, 1881 and 1882.

"The evidence establishes that for the year 1888, as well as the year 1889, the Common Council of the City of New Orleans appropriated out of the twenty per cent. reserved

for public improvements by the Act No. 20, p. 5, Sec. 66, of the Acts of 1882 and 1886, No. 109, p. 205, Sec. 1, for *the payments of debts not in the budgets of those years and not contracted in those years*, an amount greater than the aggregate of relator's judgments, and that of the said 20% reserved by the statute for public improvements, there is now for those years more in the treasury than would be sufficient to pay the entire amount of relator's judgments." (R. 37).

ASSIGNMENTS OF ERROR.

And now comes Henry Siegel, relator and plaintiff in error in this cause, by J. R. Beckwith and H. L. Lazarus, his counsel, and assigns as error of the Circuit Court in the judgment and decree herein:

First. That upon the relation, petition, return and record herein, the Court erred in not granting and allowing the peremptory writ of mandamus herein, as prayed for in the petition.

Second. That under the laws of the State of Louisiana and the facts as found by the Circuit Court, there should have been allowed a peremptory writ of mandamus as prayed for, and the Court erred in refusing to allow such writ, and in dismissing the relator's demand with costs.

Third. The Court erred in adjudging and considering the money found to be in the treasury of the City of New Orleans, and under the control of Otto Thoman, Comptroller of said City, was not in excess of revenues over expenditures for the years named in the relator's petition, to be applied to the payment of the judgments described in the relator's petition, and in not causing the same to be

applied in discharge and payment of the relator's said judgments.

Fourth. That the Court erred in its construction of the Act of the Legislature of Louisiana of 1877, and in finding, as a matter of law, that the term "former years," referred to in said Act of 1877, is to be limited and confined to "years former to 1877."

Fifth. That the Court erred in not holding that all moneys unexpended during any of said years remaining in the treasury, after the payment of all appropriations absolutely made during the year, or relating to the year in which the revenues [were] received or collected, *was* not the excess of receipts over expenditures referred to in the said Act of 1877.

Sixth. The Court erred in rendering any decree against the relator, but on the Record the facts as found and upon the statutes and public laws of the State of Louisiana, and should have rendered judgment in favor of the plaintiff and relator herein.

ARGUMENT.

The ear of this Court has been so often vexed with the dishonest practices of the municipality of New Orleans, protecting itself through cunning devices, under the shadow of legislation, that we feel we have a right to claim at the hands of this high tribunal the most serious consideration of our claims against a defendant who has at all times sought to evade and defeat the payment of its just and honest obligations. United States vs. New Orleans, 98 U. S. 392; Louisiana vs. Pillsbury, 105 U. S. 278; Wolf

vs. New Orleans, 103 U. S. 358; Board of Liquidators vs. Hunt, 118 U. S. 147.

The surplus of revenues over disbursements during the years 1888 and 1889, and which aggregates an amount in excess of the relator's demand, was to be applied to the deficiency indebtedness of previous years, under the statutory direction of Act No. 30 of the extra session of 1877. Section 3 of that Act provides that the surplus revenues shall be applied to the payment of the indebtedness of former years. The indebtedness of the City of New Orleans held by the relator, and evidenced by the judgments upon which the mandamus proceedings were based, arose during the years 1879, 1880, 1881 and 1882, and was, therefore, an indebtedness due by the City, and in existence prior to 1888 and 1889, when, as we have already stated, the revenues of the City were largely in excess of its disbursements and contractual obligations for those years.

The question controlling and determinative of this controversy is: Did the excess of revenues for the years 1888 and 1889, over and above all of the disbursements for those years, and over and above all the obligations incurred by the City in those years, constitute a surplus, which, under Act 30 of 1877, should be applied to the payment and discharge of the indebtedness of former years? The discussion of this proposition necessarily invites the consideration of the power originally exercised by the City of New Orleans in the creation of debt, and the further consideration of the legislative restriction upon all municipal authorities in the State, limiting that power. Prior to 1877, there were no limitations upon the City of New Orleans, that we are advised

of, which in any manner restricted its authority in the creation of debt, for the purpose of operating the municipal government. It was fully competent to appropriate against its estimated revenues the entire amount of those estimated revenues. There was no direction or restriction, under the charter of 1870, as to the method in which these revenues should be estimated, and, therefore, upon an exaggerated estimate of the revenues, either from taxes, licenses or contingencies, appropriations would be budgeted for the current year, and an amount sufficient to absorb the entire estimated revenues was appropriated. The result was, that the revenues never reached the amount estimated, while the appropriations and disbursements were up to the amount budgeted for, and there was always a deficiency indebtedness by the municipality; and this deficiency indebtedness, in those days as in these, represented the labor of the City employees, or materials and supplies furnished for the proper conduct of the City government. There was an absence of any relief for the unfortunate creditor of the City, because of the limitation of taxation, the power of taxation at all times being exercised and enforced by the City authorities to either the legislative or constitutional limit.

It was in part to remedy the pernicious extravagance of municipalities in creating debt, and to enforce that rule of sound political economy which directs "that you shall live within your means," that Act 30 of 1877 was passed by the Legislature of Louisiana. The Act, which we have printed as an appendix to this argument, restricts municipal corporations in Louisiana from appropriating any sum of money in excess of the actual revenues

of the year in which the appropriation was made, and after placing this general restriction on the powers of municipal corporations, it clearly and specifically enforces, by positive direction, the policy which the Legislature had in view, and provided, that:

"Sec. 3. Be it further enacted, etc., That the revenues of the several parishes and municipal corporations of this State, of each year, shall be devoted to the expenditures of that year; *provided*, that any surplus of said revenues may be applied to the payment of the indebtedness of former years."

The limitation, as your Honors will observe, confines the expenditures of each year to the revenues of that year, and the Legislature, in adding a proviso to the third section of the Act, recognized the possibility that there might be years subsequent to the passage of the Act where the estimated revenues would fall short, and where there might be a deficiency indebtedness by the municipality in consequence of the failure on the part of the municipal authorities to collect the revenues estimated, and against which estimate, appropriations were made and obligations incurred. It was to meet this exigency, if it should arise, that the proviso was added, *directing that the surplus revenues of any one year shall be applied to the payment of the indebtedness of former years.* The Act itself, independent of the recognized rule of statutory construction, looks to the administration of the affairs of municipalities in the future; and is not, as found by the learned Judges of the Circuit Court, to be held retrospective in its effect and operation, because of the condition of things then existing, and which might again exist, and which the record in this case estab-

lishes does exist, and came into existence subsequent to the passage of that Act. There is nothing in the Act itself, or in any legislation subsequent to it, which warrants the limitation upon its operative effect attempted by the Judges of the lower court. Their opinion, placing the limitations that they undertook to place upon the general statute, is both unnatural and forced; and we submit, that when your Honors read the statute itself, in the light of the pre-existing status of municipal corporations and the powers with which they were invested, the absence of limitation upon these powers, and the evil then existing and the remedy which is sought to be applied, this Court will reach the conclusion which impartially forces itself upon our minds: that the disposition of the case, upon the reasons assigned by the Judges of the lower court, is neither meritorious nor commendable. To more effectually carry out the policy of the State with reference to municipal expenditures, and with the view, in furtherance of that policy, to restrict the expenditures of each year to the revenues of that year, the Legislature of Louisiana, in 1879, passed an Act limiting the disbursements to four-fifths of the estimated revenues. The Act provided that the Council or the Administrators of the City of New Orleans should propose a detailed statement, exhibiting the amount of revenues for the ensuing years expected to be derived by the said City from taxes and licenses, and with such estimate of receipts, it should be the duty of the Board of Administrators or Common Council to propose a detailed statement or estimate, exhibiting the several items of liability and expenditure on the part of said City for the year, including the requisite amount

for contingencies during that time. Such estimate of liabilities and expenditures shall not, however, in the aggregate amount thereof, exceed four-fifths of the estimated amount of the revenues or receipts therein provided for. See Act 38 of 1879, printed in full in appendix.

Under this statute, if all the revenues estimated were collected, there would be, in consequence of the restriction on appropriations, an excess of 20%; or, if the City, from its estimated revenues, should collect any sum over and above the four-fifths provided for in Section 1 of that Act, there would be an excess of revenues to that extent; and this excess of revenues was, under the provisions of Act 30 of 1877, dedicated to the payment of the deficiency indebtedness of former years. The reasonable, the fair and the legitimate interpretation of the statutes of 1877 and 1879, justifies the statement that it was within the legislative contemplation that a surplus revenue should be created in order to meet the exigencies of just such cases as your Honors now have for consideration. For, we assert, it is an undeniable proposition that a surplus is created and exists whenever the revenues collected in a particular year are in excess of all the expenditures and disbursements of that year, and over and above all obligations contracted in that year, although they may not have been discharged within the year. That surplus, then, once existing, is, under the solemn sanction of the statute, entering into and forming part of the contract, dedicated to the payment of any deficiency indebtedness for any former year. In other words, putting on the one side all the revenues from all sources collected for a particular year, and offsetting it with all the disbursements or

obligations resulting from contracts in that particular year, and deducting the one from the other, it is mathematically true that the difference, where the revenues exceed the disbursements, is a surplus for that year. As already stated, the indebtedness upon which the relator recovered his judgments, which are the basis of the mandamus proceedings, was created between the years 1879 and 1882.

An important fact for the Court to keep constantly in view, in the consideration of this case, is that the legislation upon which the City relies was passed subsequent to the creation of our debt, and inasmuch as this legislation, under which the City is attempting to shield herself from the payment of her honest debts, was for no other purpose than to legislate out of existence the surplus to which we looked for the payment of our indebtedness, and which was solemnly dedicated to that purpose by the statute of 1877, we say, any attempt to enforce the provisions of that legislation to the prejudice of the debts in existence prior to the adoption of such legislation, not only impairs the obligation of our contract, but is essentially dishonest. The proviso in the Act of 1877 and the creation of a surplus by the Act of 1879, were written in the obligations which we hold from the City of New Orleans, and form an essential part of our contract; for, while we recognized the possibility of a deficiency in the revenues of the City, we felt, in common with the other creditors who trusted her, that, under the Statute of 1879, operative in that year, in 1880, in 1881 and 1882, as only 80% of these estimated revenues could be disposed of, and as 20% constituted a reserve and a surplus, our indebtedness could be paid out of the reserve surplus, being the 20% which could not be touched for any

purpose, and which, when collected, was a surplus which was dedicated to us for the payment of any deficiency indebtedness which might arise from the causes stated.

And now, to recur to that legislation to which we have referred. As soon as the Legislature foresaw that the revenues of the City would be augmented by the increased values of property and advanced assessments, and with that disingenuousness which has characterized the administration of the municipal affairs of New Orleans for the past twenty-five years, the idea was conceived of an indirect repudiation of the City's just debts, leaving the unfortunate creditor in a position where "his rights live but in grace, and his remedies in entreaty only;" for, if they took the only security which the creditor had, he would be utterly helpless and dependent. To bring this about, and to accomplish this, in reframing the City Charter in 1882, they created a reserve of 25% of the estimated revenues, "which reserve and all sums, rights, interests, and credits received from miscellaneous or contingent sources, shall be appropriated by the Council for the purpose of public improvements as herein provided for." Sec. 66 of Act 29 of 1882.

An analysis of this section of the charter shows that the Legislature was absolutely determined that there never should be, under any condition of things, a surplus for any purpose. Under Act 38 of 1879, Section 1, cited *infra*, the City Council was authorized to appropriate for governmental purposes 80% of the estimated revenues. The City Charter, to which we have just referred, simply restricts the Council to appropriating for governmental purposes to the full extent of the estimated revenues, and then goes on to provide 25% should be reserved so that, if the Council should at

any time exercise its full rights under the act of 1879, and appropriate 80%, it would exceed its powers under Sec. 66 of the act of 1882, inasmuch as 25% had to be reserved out of the estimated revenues, for works of public improvements, and therefore the authority of the Council was restricted, in consequence of this act, and was limited to 75% of the estimated revenues. Not only do they reserve 25% of the estimated revenues, but, in addition to that, for the creation of this fund denominated "a fund for purposes of public improvement," instead of, as it should have been characterized, "a fund created for the purpose of defeating the honest debts of the City," they reserved all sums, rights, interests, credits received from miscellaneous or contingent sources. So your Honors will readily see, from a mere inspection of the act, and with its objects and purposes unvailed, that it was to prevent the possibility of there ever being a surplus, at any time, from any source, to carry out in good faith, with the unfortunate creditors of the city, the contract which the Legislature in 1877 made—that all surplus revenues shall be applied to the payment of the indebtedness of former years. If the City's alimony, to the extent of four-fifths of the estimated revenues, is applied to the purposes stated in the act, and the balance set aside for works of public improvements, and all other sources of revenue are thrown into the common fund, how is it possible that there can be, at any time, a surplus of revenues over expenditures with which to meet the City's obligations for deficiency indebtedness.

By Act 109 of 1886, Section 66 of the city charter was amended, and the 25% provided for reduced to 20%; so that Act 38 of 1879, and the amendments to Sec. 66 of the

City charter by the Act of 1886, construed together, absorb the 100%, for the Council has the right to appropriate 4-5 of the estimated revenues, which would be 80%, and the charter provides for the other 20%, and for revenues from all other sources. The dedication of the 20%, and all other sources of revenue, to the fund for works of public improvement, was embodied in legislation subsequent to the creation and existence of our debt.

The findings of fact in the case shows that the surplus for the years 1888 and 1889 would be sufficient to pay the entire amount of relator's judgments—in other words, that the revenues of the City of New Orleans, for the years 1888 and 1889, in excess of the disbursements, expenditures, and obligations of those years, are more than enough to satisfy relator's demand. The reserve of 20% for works of public improvement, could not be used in those years, and, as the findings show, were not used in those years, because, under Act 135 of 1888, there is an absolute prohibition against the Council making any contract with reference to, or payable out of any surplus fund of any year, except to the extent that said surplus fund may exist in cash in the City treasury at the time of the contract of appropriation (Act 135 of 1888); and the attempt was made, as shown by the findings in the case, to pay debts out of this reserve, but debts "NOT IN THE BUDGET OF THOSE YEARS, AND NOT CONTRACTED IN THOSE YEARS;" so that, after the payment of all debts and the discharge of all obligations in 1888 and 1889, by the City of New Orleans, and when this surplus, from its revenues, came into existence, it was attempted to apply it, not as the Statute of 1877 directed, with reference to debts existing prior to 1882, but to debts not in the

budget of those years, nor contracted in those years, and the effect of which, if sanctioned, would be to deprive this relator of that surplus fund, to which he had a right to look, and to which he did look for the payment of his debt in the event of a deficiency, and upon the strength of which, in a measure, credit was extended to the City of New Orleans, who, taking advantage of the creditor's confidence, now seeks, under cover of this public improvement fund, to divert the trust dedicated to the payment of his debt.

It is unnecessary for us to discuss, or for the Court to consider, what effect the City Charter of 1882 had upon the Act of 1877, with reference to debts created after 1882. All that we contend for is, that the security and protection under the statute of 1877, be recognized and enforced, so far as our rights are concerned, and with reference to the debts which we hold and which were created prior to the passage of the City Charter in 1882.

We desire again to call the attention of the Court, and to impress it with the fact that, under Sec. 66 of the Act of 1882, there never can be a surplus, inasmuch as the Section provides that, after the Council has made appropriation for the alimony of the City, and shall have reserved 20% of said estimated revenues for works of public improvement, it is further provided that all sums, rights, interest and credits received from miscellaneous or contingent sources, shall be appropriated by the Council for works of permanent public improvements, etc.; so that, even should the Council not absorb its *quota* upon the basis of estimated revenues, the surplus, besides the 20% reserve, would go into and form part of this fund for works of public improvement. So that, under any aspect in which the case pre-

sents itself to the legal mind, since the passage of Act 109 of 1886, there can never be a surplus, at any time, for the purpose of retiring and extinguishing the deficiency indebtedness of former years; and the purpose and object that the Legislature and City had in view was to defeat this deficiency indebtedness by absorbing whatever surplus might exist, and which would be applied under the direction of the Act of 1877; and the effect of which would be to impair the obligation of the contract entered into by the City of New Orleans with its creditors, under legislative sanction.

There is a point made in the return which merits only a passing reference. The contention was that the Act of 1877 was merely permissive, that the language of the *proviso* is, that the surplus "*may be applied*" to the payment, etc.; and that the City authorities were not obliged to apply the surplus in the manner sought by the relator. "Where a power is given by a statute to public officers in permissive language, as that they '*may*, if deemed advisable,' do a certain thing, the language used will be regarded as peremptory where the public interests or individual rights require it should be." Supervisors vs. United States, 4 Wall. 435. We shall not waste any time in multiplying authorities upon this elementary principle. The word "may," as used in these statutes, in connection with the rights of relator, is to be read "shall," and the duty to apply the surplus is not discretionary, but mandatory and peremptory.

It is not necessary to go into the return as to the condition of the City's revenues, or its indebtedness prior to the years 1888 and 1889, in which it is claimed by the relator that the surplus exists. Upon the original return the re-

lator excepted for insufficiency, and the exception was maintained, directing the respondent to file an amended return showing the collections and disbursements of the City during the years 1888 and 1889, respectively, being the years in which the surplus is claimed. (R. 30, 31). The amendment is quite as vague and indefinite as the original return, the effort being to conceal the true condition and *status* of the City's affairs for those years. But this is immaterial, as the Court was not called upon to find any fact, nor did it make a finding of fact, as to any other indebtedness prior to 1882, than that represented by the relator. In the absence of findings to that effect, the return is without force, and with the finding that there was unexpended in 1888 and 1889, for debts not on the budget or contracted in those years, an amount sufficient to pay the debt of relator, we submit that we have established: first, that the excess of revenues over disbursements in those years constitutes a surplus dedicated by the Act of 1877 to the payment of the deficiency indebtedness of former years; and, secondly, that the surplus was legally dedicated and cannot be diverted by the debtor, so as to impair or destroy the security which the relator had, and to which he looked for payment at the time of the creation of his debt.

We respectfully submit that, upon the errors assigned, the decree should be reversed, and the relator have, under the mandate of this Court, the relief sought in his petitions.

Respectfully submitted,

J. R. BECKWITH,
HENRY L. LAZARUS,
Attorneys for Plaintiff in Error.

JANUARY 1st, 1895.

APPENDIX.

Secs. 18 and 19 of Act No. 7 of 1870.

Sec. 18. Be it further enacted, etc., That the Council of the City of New Orleans shall, for the purposes of this act, once at a regular meeting in the month of December, and not oftener, in each and every year, lay an equal and uniform tax on all real and personal property in said City, as prescribed, and under the limitations imposed in this act for the ensuing year, which said tax shall be due and payable at the office (of the) Department of Finance, from the first day of March to the twenty-first day of July, inclusive; and at its first regular meeting in December, and on the same day annually thereafter, shall impose an annual license tax on trades, professions and callings, as herein prescribed, said licenses to expire on the thirty-first day of December, in the year in which it was obtained, and which license tax shall be due and payable at the office of the Finance Department, from the first day of January to the twenty-eighth day of February, inclusive.

Sec. 19. Be it further enacted, etc., That the Council shall, once in every twelve months, before fixing and deciding upon the amount of taxes and licenses to be assessed for the ensuing year, cause to be made out a detailed estimate exhibiting the various items of liabilities and expenditures, including the requisite amount for contingent expenses during said year, and shall cause the same to be published, for at least ten days, in the official journal of the City, and such rate of taxation, not exceeding one dollar and seventy-five cents on every hundred dollars of valuation, shall thereafter be fixed and assessed as, together with other revenues of the City, may be necessary to meet said estimated liabilities and expenditures. The adoption of said detailed estimate shall be considered as the appropriation of the amount therein stated for the purposes therein stated; and the Administrator of Public Accounts shall not audit, nor shall the Administrator of Finance draw or sign any check upon the Fiscal Agent therefor, of any claims, unless an appropriation therefor has been duly made, in accordance with this act.

Act No. 30 of 1877.

No. 30.] AN ACT

To limit the appropriations and expenditures of parishes and municipal corporations; to prohibit the issue of warrants by their officers; to permit police juries to make certain contracts, and prescribing certain penalties.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That no police jury of any parish, nor any municipal corporation in this State, shall make any appropriation of money for any year, which appropriation, separately or together with any other appropriation or appropriations of the same year, shall be in excess of the actual revenue of said parish or municipal corporation for that year.

Sec. 2. Be it further enacted, etc., That no police jury of any parish nor municipal corporation in this State shall approve any claim or make any expenditure which shall, separately or together with other claims approved or expenditures made, be in excess of the actual revenues of that year.

Sec. 3. Be it further enacted, etc., That the revenues of the several parishes and municipal corporations of this State, of each year, shall be devoted to the expenditures of that year; *provided*, that any surplus of said revenues may be applied to the payment of the indebtedness of former years.

Sec. 4. Be it further enacted, etc., That the police juries of the several parishes in this State may and are hereby authorized and empowered to contract for fixed and determined sums of money with those officers who receive in compensation for services, under existing laws, fees, commissions or mileage from said parishes; *provided*, the compensation allowed shall not exceed fifty per centum of the fees allowed by the laws of the State.

Sec. 5. Be it further enacted, etc., That no (evidence of indebtedness or) warrant for the payment of money shall, after the first day of October, eighteen hundred and sev-

enty-seven, be issued by any officer of any parish or municipal corporation in this State, except against money actually in the treasury of said parish or municipal corporation. Any person violating the provisions of this section shall, on conviction, be punished by imprisonment or fine, or both, at the discretion of the court; *provided*, that this section shall not apply to the certificates issued to jurors and witnesses for their services in the courts.

Sec. 6. Be it further enacted, etc., That all laws in conflict with this act are hereby repealed.

Act No. 38 of 1879.

No. 38.] AN ACT

To provide for the municipal budget or estimate of receipts and expenditures of the City of New Orleans; for the appropriation of moneys to be withdrawn; prohibiting a change in the destination of appropriated funds; making such change penal; providing for the order of paying claims appropriated by ordinances, and attaching a penalty to a violation of ordinances in last mentioned respect.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That it shall be the duty of the Board of Administrators or Common Council of the City of New Orleans, or on about the second Tuesday of December, 1879, and upon the second Tuesday of December of each and every year thereafter, or thereabout, to propose a detailed statement exhibiting the amount of revenues for the ensuing year *expected* to be derived by the said City from taxes and licenses, and with such estimate of receipts as aforesaid, it shall be the duty of the aforesaid Board of Administrators or Common Council to propose a detailed statement or estimate, exhibiting the several items of liabilty and expenditure on the part of said city for the year aforesaid, including the requisite amount for contingent expenses during that time; such estimate of liabilities and expenditures shall not, however, in the

aggregate amount thereof, *exceed four-fifths* of the estimated amounts of revenues or receipts thereinabove provided for.

Sec. 2. Be it further enacted, etc., That the estimates of receipts and expenditures and liabilities hereinabove required to be proposed, immediately after such proposal, or as soon thereafter as may be practicable, shall be published for ten consecutive days in the official journal of the city of New Orleans.

Sec. 3. Be it further enacted, etc., That at the first regular meeting of the Board of Administrators, or Common Council of the city of New Orleans, held after the expiration of the aforesaid publication, it shall be the duty of said Board or Council to proceed to adopt the estimate of receipts or revenues, and of the liabilities and expenditures hereinabove required to be proposed, and then and there to levy a tax, and to provide for the collection thereof, and for the realization of the license tax, for the purpose of meeting the liabilities and expenditures thus estimated and adopted; *provided*, however, that the tax thus to be levied shall not exceed the limit prescribed by law.

Sec. 4. Be it further enacted, etc., That the adoption of the detailed estimates of receipts and expenditures shall be considered as an appropriation of the amounts therein stated, for the purposes therein set forth, and no money shall be drawn from the city treasury except the same shall have been previously appropriated for the purpose for which it shall be drawn.

Sec. 5. Be it further enacted, etc., That any amount or amounts set forth in the city budget of the city of New Orleans, or the estimates of receipts and expenditures of said city for any particular purpose, shall not be diverted from that object for any cause or reason whatsoever, so long as any part or portion of the liability or expenditure for the payment of which said amount or amounts were appropriated, remains unpaid; and any and all appropriations shall remain and be kept sacred to the object of their appropriations until the liability or debt thus provided for shall have become paid and extinguished; and for any violation of this section the Mayor and Administrators found

guilty thereof shall be punished by a fine of not less than five hundred dollars, or by imprisonment for not less than three nor more than six months, or by fine and imprisonment

Sec. 6. Be it further enacted, etc., That any and all sums of money appropriated by the Board of Administrators or Common Council of the city of New Orleans shall be paid in the order of the adoption of the ordinances wherein the appropriation is made; and for any violation of this section the Mayor or Administrators found guilty thereof shall be subject to the like penalty as is prescribed in the fifth section of this act for an improper use of appropriated funds.

Sec. 7. Be it further enacted, etc., That this act shall take effect from and after its passage.

Act No. 20 of 1882.

REVENUE AND EXPENSES.

Sec. 64. That the Council shall, once in twelve months, before fixing and deciding upon the amount of taxes and licenses to be assessed for the ensuing year, cause to be made out a detailed estimate, exhibiting the various items of liability and expenditures, including the requisite amount for all expenses during said year, and shall cause the same to be published for at least ten days in the official journal of the city, and such rate of taxation as provided by law, on every hundred dollars of valuation, shall thereafter be fixed and assessed as, together with other revenues of the city, may be necessary to meet said estimated liabilities and expenditures. The adoption of said detailed estimates shall be considered as the appropriation of the amount therein stated for the purposes therein stated, and the Comptroller shall not audit, nor shall the Treasurer draw or sign any checks upon the Fiscal Agent therefor of any claims, unless an appropriation therefor has been duly made in accordance with this act.

Sec. 65. The Council, in fixing the budget of revenue and expenses, as herein provided for, shall not consider and adopt as a revenue, miscellaneous or contingent re-

sources, and affix thereto either an arbitrary or nominal value or amount; but whenever such resources are considered and adopted, they shall be estimated on a real and substantial basis, giving the source whence to be derived, a specific sum to be received from each item thereof and no more. The Council is hereby prohibited from estimating for expenditures to be derived from any uncertain or indefinite source, cause or circumstance; but the Council shall, by proper ordinances, provide for the receipt and disbursements of any sums of money, interests, rights, or credits, that may accrue to the corporation, by behest, grant or any cause whatever; and all such sums, rights, interests, or credits, so received, shall be and are hereby appropriated for the purposes of public works and improvements, the manner and details of such appropriations to be ordered by the Council.

Sec. 66. The Council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the estimated revenues, but shall reserve twenty-five per cent. of said estimated revenues, which reserve and all sums, rights, interests and credits received from miscellaneous or contingent sources shall be appropriated by the Council, for the purposes of public improvements as herein provided for.

Act No. 109 of 1886.

No. 109.] AN ACT

To amend an act entitled "An Act to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions," approved June 23, 1882; and to provide for limit of appropriations in the city of New Orleans, and to repeal an act approved May 10, 1884, entitled, etc.; public notice having been given in accordance with the requirements of Article 48 of the Constitution.

Be it enacted by the General Assembly of the State of Louisiana, That section 66, of Act No. 20, approved June 23, 1882, entitled "An Act to incorporate the city of New

Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions," be amended and re-enacted so as to read as follows: The council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent. of said revenues, which reserve and all sums, rights, interests and credits received from miscellaneous or contingent sources, shall be appropriated by the council for the purpose of permanent public improvement, as herein provided for.

And be it further enacted by the General Assembly of the State of Louisiana, That Act No. 88, approved July 10, 1884, entitled "an act to amend and re-enact an act" be and the same is hereby repealed.

Act No. 135 of 1888.

No. 135]. AN ACT

Further defining the powers and duties of the Council and officers of the city of New Orleans and imposing additional limitations thereon.

Whereas, Due and timely notice of the intention to apply for the passage of this act has been given, and evidence of the publication of said notice exhibited to the General Assembly as required by article 48 of the constitution.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That neither the council of the city of New Orleans, nor any committee thereof, nor any of the officers of said city, shall have the power to bind the city by any contract for any public work, or for the purchase of any materials or supplies for any of the departments of the city government, unless there shall have been previously passed a resolution authorizing the said contract or the said purchase, and unless the said contract for public work or for the furnishing of said materials and supplies shall have been let by the comptroller to the lowest bidder, as provided in section 21 of the city charter, provided, however, that in cases of emergency the officers of the various departments may make bills for supplies of materials not ex-

ceeding fifty dollars; but in all such cases, immediate report in writing of the making of such bill, shall be made by the head of the department to the mayor, setting forth the reason of his action, which report shall be laid by the mayor before the council and receive the approval of that body before the said bill is ordered paid.

Sec. 2. Be it further enacted, etc., That on the first of January and July of each and every year, each and every head of every department of the city government shall lay before the council an estimate of the supplies and material (within the limitation of the appropriations made in the budget for his department) that may be needed in his department during the current six months; and the said council shall approve or modify, in its discretion, said estimate, and shall thereupon direct the comptroller to advertise and adjudicate the contract to furnish said supplies and material, or so much thereof as may be needed, to the lowest bidder, as provided in section 21 of the city charter.

Sec. 3. Be it further enacted, etc., That said council shall have no power to make or renew any lease of the wharves or landings, or any lease of sale of city property, except after public advertisement and free competition, and adjudication by the comptroller to the lowest or highest bidder, as the case may be, according as the specification of said lease or sale may require.

Sec. 4. Be it further enacted, etc., That said council shall not have power to grant, renew or to sell or to dispose of any street railroad franchise, except after at least three months' publication of the term and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the comptroller, as provided in section 21 of the city charter.

Sec. 5. Be it further enacted, etc., That the said council be and the same is hereby prohibited from making any contract with reference to, or payable out of, or any appropriation of the surplus fund of any year, except to the extext that said surplus fund may exist in cash in the city treasury at the time of the contract or of the appropriation.

Sec. 6. Be it further enacted, etc., That all the officers

and members of the city government are hereby required and commanded to attend personally to the duties of their offices, and are hereby prohibited from absenting themselves from the city of New Orleans, unless by the permission of the council previously granted, for reasonable cause stated and approved. They shall keep their offices open from 9 o'clock in the morning until 4 o'clock in the evening, and shall require their employees and clerks to be and to remain therein during those hours.

Sec. 7. Be it further enacted, etc., That at the end of each and every year, and not before, the council shall, by proper ordinance, and under proper limitations and restrictions, farm out and adjudicate the contract to collect the delinquent taxes and licenses of that year to the lowest bidder, after at least ten days public advertisement; provided that the percentage allowed such farmer shall never exceed five per centum on the amount collected and paid into the treasury; that the payment of such taxes and licenses shall always be made to the city treasurer and not to the farmer; that the city shall be at no cost or expense of said collection; that each farmer shall be required to close his contract within two years, and that his bond shall not be cancelled until he accounts for every tax bill in his hands, either by collecting the same or by showing that the same cannot be collected, and the reason of such non-collectibility; and on all licenses and bills uncollected at the end of said two years, he shall receive no commissions.

Sec. 8. Be it further enacted, etc., That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892.

No. 125

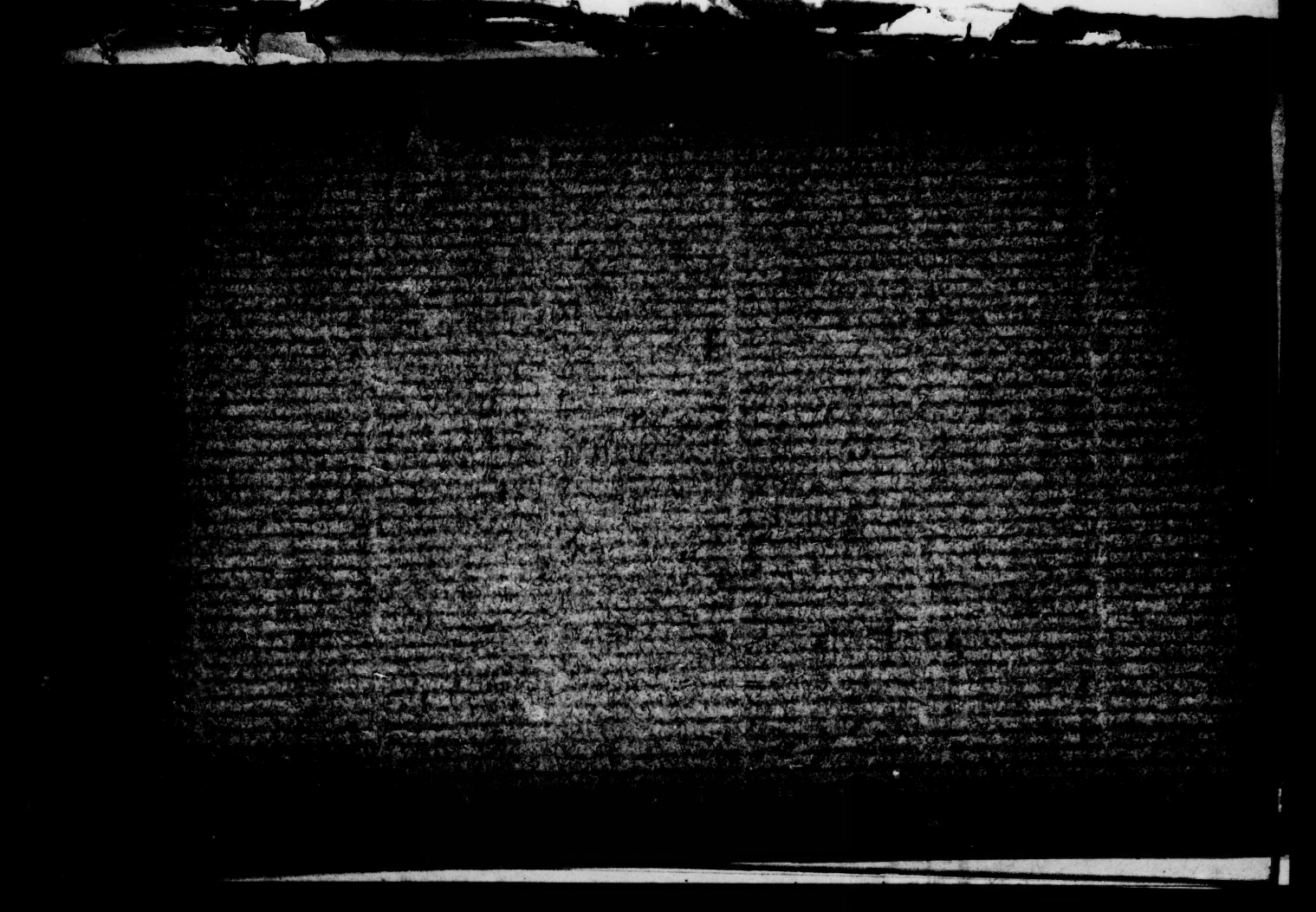
THE UNITED STATES EX REL. HENRY SEIGEL,
PLAINTIFF IN ERROR,

versus

OTTO THOMAN, COMPTROLLER OF THE CITY OF NEW ORLEANS.

E. A. O'SULLIVAN,
City Attorney of New Orleans.

M. F. Dunn & Bro. Stationers and Printers, 70 Camp Street, N. O.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 711.

THE UNITED STATES EX REL. HENRY SEIGEL,
PLAINTIFF IN ERROR,

versus

OTTO THOMAN, COMPTROLLER OF THE CITY OF NEW ORLEANS.

STATEMENT OF FACTS.

Henry Seigel, a citizen and subject of the Empire of Germany, sued the City of New Orleans, as holder and owner of a number of certificates of indebtedness drawn by the City of New Orleans and made payable to bearer, issued for street wages and labor, during the years 1879, 1880, 1881 and 1882.

There was judgment in his favor and against the City of New Orleans. This judgment was by its terms to be paid exclusively out of such revenues of of the City of New Orleans of the years 1879, 1880, 1881 and 1882, as might be collected from the reve-

nues set apart by the amended budget of the City for those several years. It was further adjudged that any surplus of the revenues of any subsequent year might be applied to the payment of the debts of these years, according to Section 3 of Act No. 30 of 1877 (Record, pages 1 to 20).

Plaintiff then filed a petition, alleging that there was in the City Treasury a surplus of revenues for the years 1888 and 1889, out of which he was by law and under this judgment entitled to be paid, and praying for a writ of mandamus, for that purpose directed to the City Comptroller (page 21). There were seventeen suits *ejusdem naturæ*, which were ordered consolidated under No. 11,900, and the title of Henry Seigel vs. City, and one return and answer ordered to stand in all (page 29).

The return and amended return substantially alleged:

(1) That the judgment is not an absolute and general one against the City, but limited to the revenues of particular years.

(2) That in accordance with law, in the budgets of expenditures and revenues were made appropriations for the years 1888 and 1889, to the full extent of the estimated revenue, twenty per cent. thereof for permanent public improvements, and eighty per cent.

thereof for the alimony of the City or expenses of carrying on its government.

(3) That the revenues so dedicated cannot be diverted or used for any purpose until all the debts representing claims on the budget have been paid, and there cannot therefore be a surplus until full payment of these.

(4) That there is not, and there has never been a surplus for the years 1888 and 1889, but, on the contrary, the taxes collected have been sufficient to pay only the eighty per cent. for the alimony, but not sufficient to pay the claims payable out of the reserve fund of twenty per cent., and a mandamus will not lie against a public officer to pay money before it has come into his possession.

(5) That the outstanding indebtedness of the City of New Orleans for the years 1879 to 1886, inclusive, amounts to the sum of $383,444.46 (including relator's various claims), now sought to be collected by way of mandamus proceedings similar to those in the instant suit.

(6) That for the year 1888 there is in cash in the City Treasury to the credit of the twenty per cent. reserve fund, $29,066.17, a sum less by $12,342.82 than is necessary to pay the claims against that fund for that year.

(7) That for the year 1889 there is in cash in the

treasury of the City to the credit of the reserve fund, $47,901.21, a sum less by $30,388.89 than is necessary to pay the claims against that fund for that year (pages 21 to 32).

The cause was heard upon the application of the relator for a writ of mandamus, and the Circuit Court, both Judges concurring, denied the application and refused the writ. Plaintiff sued out this writ of error (page 33).

The facts found by the Court are as follows:

"The judgments of the relator against the respondent amount in the aggregate to $74,262.17, and are founded on indebtedness arising in the years 1879, 1880, 1881 and 1882.

"The evidence establishes that for the year 1888, as well as the year 1889, the Common Council of the City of New Orleans appropriated, out of the twenty per cent. reserved for public improvements by the Act No. 20, page 35, section 66 of the Acts of 1882, and 1886, No. 109, page 205, section 1, for the payment of debts not in the budget of these years, an amount greater than the aggregate of relator's judgment, and that of the said twenty per cent. reserved by the statute for public improvements there is now for these years more in the treasury of the respondent than would be sufficient to pay the entire amount of relator's judgment," (page 37).

The errors specially assigned are as follows:

That the Court erred in adjudging and considering the money found to be in the treasury of the City of New Orleans and under the control of Otto Thoman, Comptroller of said City, was not excess of revenues over the expenditures for the years named in relator's petition, to be applied to the payment of the judgments described in relator's petition, and in not causing the same to be applied in discharge and payment of the relator's said judgment.

That the Court erred in its construction of the Act of Legislature of Louisiana of 1887, and in finding as a matter of law that the term "former years," referred to in said Act of 1877, is to be limited and confined to years former to 1877.

That the Court erred in not holding that all moneys unexpended during any of said years remaining in the treasury after the payment of all appropriations absolutely made during the year or relating to the year in which the revenue was received or collected was not the excess of receipts over expenditures, referred to in the said Act of 1877, pages 35, 36.

ARGUMENT.

The matter in dispute involves the interpretation of various enactments of the General Assembly of

amount for contigent expenses during that time; such estimate of liabilities and expenditures shall not, however, in the aggregate amount thereof, exceed four-fifths of the estimated amounts of revenues or receipts thereinabove provided for."

Act No. 20, of 1882, Section 66 (City Charter):

"The Council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the estimated revenues, but shall reserve *twenty-five per cent.* of said estimated revenues, which reserve and all sums, rights, interest and credits received from miscellaneous or contingent sources, shall be appropriated by the Council for the purposes of public improvement as herein provided for."

Act No. 88 of 1884 amended the above by substituting ten per cent. for twenty-five per cent.

Act No. 109 of 1886 amended the above so as to make the amount to be reserved twenty per cent.

Relator's contention is that there is a surplus for the years 1888 and 1889, to which he is entitled because the debts due him by the City were incurred since the passage and under the operation of the Act of 1877, and he had acquired certain fixed rights which could not be affected or impaired by any subsequent legislation.

The question therefore hinges on the meaning of

the term "surplus" in the Act, and the intention of the Legislature in enacting the statute of 1877. The motives of the Legislature and the circumstances surrounding the passage of that law are well set forth by the Judges of the lower court: "The Legislature had been endeavoring by every legislative mandate to prevent the City of New Orleans from increasing its floating debt; up to the date of that statute their efforts had been vain. Then it was enacted that no appropriation should be made and no claim approved by any municipal corporation during any year in excess of the actual revenues of that year, that the revenues of each year should be devoted to the expenditures of that year, and, since a large floating debt for former years already existed, a provision was added that any surplus of revenues might be applied to the payment of the indebtedness of former years."

It is apparent, that under the terms and purpose of the statute, the words "former years" are solely applicable to those preceding 1877, because the injunctions of the statute are positive and prohibit the making of any appropriation in excess of revenues and consequent creation of any debt in subsequent years. The act was aimed against the contracting of debts and had for its object the restriction of the annual municipal expenditures within the annual municipal in-

come. It did not design to limit the discretion of the Common Council of the City of New Orleans in the matter of appropriations, except in so far as to restrict them within the revenues. It remained competent for the Council within that limit to make any and all appropriations it might deem proper or necessary for any purpose whatsoever, and to exhaust the revenues, and, therefore, there could not, either in fact or in law, be a surplus, unless an amount was left unappropriated.

The Act of 1877 does not insure or provide a surplus; it merely says what shall be done with it, in case one should arise. Legislative discretion was left unimpaired as to how much could be appropriated, and for what purposes, with the simple proviso that the limit of actual revenue must be the limit of legal annual expenditure.

We, therefore, fail to see what rights relator can claim under the legislation of 1877 and 1879. The Acts of 1882, 1884 and 1886 (City Charter, and amendments thereto), make it the imperative duty of the Common Council to appropriate twenty per cent. of the revenues annually for the purpose of permanent improvement. It is this reserve fund that relator is now endeavoring to subject to the payment of his claim on the plea that it is a surplus, when, as a mat-

ter of fact, though unexpended, it is appropriated by the Council in the budgets of 1888 and 1889, for permanent public improvement, in compliance with legislative command. Without the mandatory legislation of 1879, 1882, 1884, 1886, it would have been competent for the municipal government, under the terms of the Act of 1877, to exercise its discretion as to the amount and purpose of appropriations, and this discretion could not have been subject to judicial control save in the single respect of restricting the appropriation to the revenues. How much stronger is the position, when the appropriation of twenty per cent. is made under the positive instructions of the legislature by virtue of an act dedicating that amount to the "highly meritorious purpose of permanent public improvements." Relator has no rights under the the Act of 1877, therefore the legislation since that time has deprived him of nothing, and gives him no ground of complaint.

We believe the conclusions of the Circuit Court unassailable: "Our opinion, therefore, is that there is no surplus shown, but that the amount remaining unexpended is destined by the Legislature to the purpose of public improvements and cannot be diverted from that purpose, either by the City or its creditors, and that there was no intention on the part of the Legis-